
(2003) 05 AHC CK 0235

Allahabad High Court (Lucknow Bench)

Case No: Criminal Appeal No's. 510, 549, 565 and 606 of 1980

Suresh and Others

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: May 21, 2003

Acts Referred:

- Arms Act, 1959 - Section 25
- Criminal Procedure Code, 1973 (CrPC) - Section 161, 173
- Penal Code, 1860 (IPC) - Section 148, 149, 302, 307, 379

Citation: (2004) 2 ACR 1588

Hon'ble Judges: Khem Karan, J; K.S. Rakhra, J

Bench: Division Bench

Advocate: N. Mohan and S.K. Awasthi, for the Appellant; G.A, for the Respondent

Final Decision: Allowed

Judgement

Khem Karan, J.

All these criminal appeals are directed against the judgment and order dated 30.8.1980 delivered by Sri Mohan Singh, the then IVth Additional Sessions Judge, Hardoi in S.T. No. A-151 of 1978, by which he convicted Appellant Chhotey Lal u/s 411 of I.P.C. and the rest of the Appellants under Sections 302/149, 307/149, 148 and 379/149 of I.P.C. While Chhotey Lal was sentenced to two years R.I. u/s 411 of I.P.C., the rest were sentenced to life imprisonment, seven years R.I., two years R.I. and two years R.I. respectively under Sections 302/149, 307/149 and 379 of I.P.C.

2. Appellants Suresh son of Ram Charan, Ashok, Jagannath of CrI. Appeal No. 510 of 1980 and Suresh son of Laxman of CrI. Appeal No. 565 of 1980 have died during the pendency of the appeal, hence their appeal stands abated.

3. The occurrence dated 5.7.1977 is said to have taken place at about 10.00 a.m., near the clinic of Dr. Ram Prasad, on Beniganj-Sandila Road, within the limits of

village Kothawan, in which Chhunnan Singh of village Kakupur, Chhotey Lal of village Mathia were killed and Nattha (P.W. 2) and Muneshwar Pal were injured by use of bombs by two unidentified culprits and by use of firearms, by the Appellant (excepting Chhotey Lal) and one Shyam Sunder (died during the course of trial).

4. In brief, the prosecution case in the trial court was as under:

It was on 5.7.1977 at about 9.30 a.m., the deceased Chhunnan Singh, accompanied by his bother Yogendra Pratap Singh (P.W. 1), brother-in-law Akhandanand Singh, Natha (P.W. 2) and Chhotey Lal (also deceased) started his journey to Sandila, by a jeep driven by driver Shripal and as Chhunnan Singh had some work in Kothanwan block and as Ex-M.L.A. Angney Lal (P.W. 4) had also to board on the jeep, for going to Sandila, so he touched Kothanwan. Their jeep stood parked, in front of the clinic of Dr. Ram Prasad, on Beniganj-Sandila Road. It was at about 10.00 a.m. that Muneshwar Pandey, Balak Ram and Nankan Singh of Village Kothanwa met Chhunnan Singh. Ex. M.L.A. Angney Lal (P.W. 4) also came and started chatting with Chhunnan Singh. It so happened that Akhandanand Singh, left for answering the call of nature, leaving his rifle in the jeep. Yogendra Pratap Singh, Balak Ram, Nankan Singh, moved to a nearby shop to have betel nuts. The driver Shripal gave horn, so as to call the persons concerned to come and move. It was at this juncture that two unidentified culprits sprang up from the western side, and started hurling bombs at the jeep and before Chhunnan Singh, Chhotey Lal, Natha and Muneshwar Pandey could manage to escape, all the eleven accused named in the F.I.R., emerged on the scene armed with rifles and guns and started firing at Chhunnan Singh and others. Natha (P.W. 2), and Muneshwar Pandey occupying the rear seat of the jeep, though wounded badly, managed to run out of the jeep and to take shelter by the side of the wall of the clinic of Dr. Ram Prasad. The driver and Angney Lal (P.W. 4) could manage to escape unhurt. But Chhunnan Singh and Chhotey Lal were killed on the spot. It was said that these offenders, took away four fire arms (rifle of Chhunnan Singh, DBBL gun of Muneshwar Pandey, SBBL gun of Nankau Singh and rifle of Akhandanand Singh, kept inside the jeep) while fleeing from the spot.

5. It was stated in the F.I.R. that accused Suresh, S/o Ram Charan, Jagannath, Ram Swarup, Bishambhar and Shyam Sunder were armed with rifles and the rest with guns. Old enmity with the Appellant Suresh, S/o Ram Charan of village Nagawa was said to be the motive of this crime. It was also alleged that while running away after killing the two persons and injuring Natha and Muneshwar Pandey, the culprits damaged the tyres of the jeep by firing at them.

6. As none of the Sub-Inspectors of the police was present at the police station, when F.I.R. was lodged at 12.05 p.m., Head Moharrir, Prem Shanker Dixit sent two constables Rajendra Singh and Kallu Ram to the spot and simultaneously deputed constables Vijay Shanker and Shiv Pal Singh to go to Hardoi with a copy of the F.I.R. and G.D. to deliver the same to S.H.O. Har Govind Singh Chahar (P.W. 11), who had gone for giving evidence in some case. Shri Chahar reached the place of occurrence

at about 3 p.m. He prepared the inquest reports of the two dead bodies and despatched the same for post-mortem examination. Other articles found on the spot were also seized and necessary fards were prepared.

7. The post-mortem of the two dead bodies was conducted by Dr. Yash Pal (P.W. 4) on 6.7.1977 in the forenoon and a number of ante-mortem injuries were found on the same, which could have been caused by the weapons assigned to the known or unknown offenders. Dr. B. N. Sironjia (P.W. 13) of Primary Health Centre Kothawan, examined Natha and Muneshwar Pandey on the same day at 10.30 a.m. and 3.25 p.m. respectively and found a number of injuries, as noted in Exts. Ka-19 and Ka-20.

8. The Investigating Officer Sri Chahar (P.W. 11) was substituted by Inspector Sri B. N. Misra (P.W. 19). He came to know from Natha and Dr. Saxena (D.W. 8) that statement of injured Natha was recorded as regards the occurrence, on the same day, by Dr. Sironjia of P. H. C. Kothawan so he made efforts to locate the same, but Dr. Sironjia denied to have done so, in his belated statement u/s 161. Sri Misra also came to know, that looted DBBL gun of Muneshwar Pandey was recovered from Appellant Chhotey Lal, by Sri R. S. Bora S.H.O. Sandila (P.W. 7) on 8.8.1977. After completing the investigation, Sri Misra, submitted a report u/s 173 of Cr. P.C., for prosecution of 11 named accused and Chhotey Lal. The two unidentified assailants, however, could not be found out.

9. In all, prosecution examined as many as 19 witnesses and filed a number of documents. Amongst these witnesses, Yogendra Pratap Singh (P.W. 1), Natha (P.W. 2) and Angney Lal (P.W. 3) were the alleged eye-witnesses.

10. Siddh Gopal and Dr. S. K. Srivastava were examined as C. Ws. 1 and 2 respectively. The accused also examined as many as 8 witnesses, namely, Hari Kishore Misra as D.W. 1, Onkar Yadav as D.W. 2, Prem Narain Verma as D.W. 3, Ishwari Dutt as D.W. 4, D. K. Shukla as D.W. 5, Ayodhya Prasad as D.W. 6, Deena Nath as D.W. 7 and Dr. Suresh Chandra Saxena as D.W. 8. They also filed a number of documents which were exhibited as Exts. Kha-1 to Kha-89.

11. Impressed by the eye-account of the incident as given by Yogendra Pratap Singh (P.W. 1), Natha (P.W. 2) and Angney Lal (P.W. 3), the learned Sessions Judge recorded a finding that all the named accused put on trial, were guilty of committing the various offences as stated above and believing the evidence of Sher Ali (P.W. 6) and R. S. Bora (P.W. 7) found Chhotey Lal guilty u/s 411 of I.P.C. He disbelieved the evidence of Dr. Saxena (D.W. 8) on the point that statement of Natha was recorded on 5.7.1977 at P.H.C. Kothawan.

12. Sri Nagendra Mohan, the learned Counsel for the Appellants has tried to assail the finding of guilt, on the following grounds:

(1) That the case as put in F.I.R. (Ext. Ka-1) did not indicate as to how these 11 named accused, belonging to different villages could know that Chhunnan Singh and others

would reach Kothawan and halt at that place, as Kothawan does not fall on way to Sandila from Kakupur.

(2) That the evidence led at the trial to show that program of 5.7.1977 was settled on 3.7.1977, in village Kakupur, at the time of inauguration of Kharanja road, was an afterthought improvement with a view to meet above-mentioned infirmity and so should not have been accepted by the trial court.

(3) That it is a fact that accused Ashok Kumar son of Suresh son of Ram Charan was himself a lad of 16-17, and another accused Ram Jiwan was just 18-19 at the time of occurrence, and considering their tender ages, their respective fathers, namely, Suresh son of Ram Charan and Ram Lautan would have never risked their lives and future, by involving them in commission of this crime.

(4) That there was no good reason to disbelieve and discard the evidence of Dr. Saxena (D.W. 8), on the point that statement of Natha, was recorded on the date of occurrence at 10.30, at P.H.C. Kothanwan.

(5) That suppression by the prosecution of the earlier statement of Natha (P.W. 2), recorded as his dying declaration, leaves sufficient room for doubting the correctness of the version of Natha and others, as regards the involvement of the named accused.

(6) That presence of Yogendra Pratap Singh (P.W. 1) and Angney Lal (P.W. 3) at any such occasion, when Chhunnan Singh and Chhotey Lal were killed and Natha (P.W. 2) and Muneshwar were injured, was highly doubtful, for none of them received injuries.

(7) That F.I.R. Ext. Ka-1 was ante-dated and ante-timed, after part of the investigation was done.

(8) That the crime was committed by unknown assailants and these accused were falsely implicated, after due deliberations and consultations, on the basis of suspicion and on account of enmity with the complainant and the local police.

(9) That the prosecution has not given any plausible explanation for not examining any witness of that locality.

(10) That all the three witnesses of fact (P. Ws. 1, 2 and 3) are highly inimical, partisan and interested and so their evidence should not have been acted upon for recording a finding of guilt.

(11) That the circumstances that none of these witnesses of fact, could give the features of two unidentified culprits, itself indicates that even if present, they had no opportunity to see the faces and features of the assailants.

(12) That the story that all the four firearms, of the complainant party, were kept in the rear portion of the jeep, is improbable.

(13) That the evidence on the point of recovery of a gun from Appellant Chhotey Lal, is unreliable as no independent witness has come to support the same.

13. The learned Counsel for the State has tried to support the conclusion drawn by the trial Judge and has further contended that evidence of eye-witnesses, especially of injured witness Natha (P.W. 2) cannot be characterized unreliable or untrustworthy on mere possibilities or probabilities as pointed out by Sri Nagendra Mohan. According to him, the evidence of Dr. Saxena was rightly disbelieved and there is no reason to take a different view. He submits that the factum of recording of statement of Natha, by a doctor in P.H.C. Kothawan was purposely introduced with a view to create doubt about the correctness of the prosecution version and even if it is assumed for the sake of argument that any such statement was recorded, it is difficult to draw an inference that the same was not consistent with the prosecution version. The learned Counsel has also argued that where crimes are committed in broad day light people of the locality normally desist from coming forward to depose against one or the other for obvious reasons and so the evidence of all these three witnesses of fact, cannot be rejected on the ground that any witness of the locality has not been examined to prove that the crime was committed by the present Appellants.

14. We find sufficient force in the contention of Sri Nagendra Mohan that the prosecution story as put before the Court, leaves sufficient room for the argument as to how these accused, belonging to different villages and different families could know that the deceased would go to Kothawan and halt his jeep near the clinic of Dr. Ram Prasad. It is not in dispute that Kothawan does not fall on way to Sandila from village Kakupur. The subsequent improvement at the stage of evidence that programme of 5.7.1977 was settled on 3.7.1977 and according to that programme Angney Lal had to meet the deceased Chhunnan Singh near the clinic of Dr. Ram Prasad, cannot be believed. It appears to have been introduced with a view to fill in the lacuna in the prosecution case.

15. P.W. 1 and P.W. 3 have conceded in so many words that they never stated before the Investigating Officer that programme of 5.7.1977 was finalised in village Kakupur on 3.7.1977. They have also conceded that they never stated in their statements u/s 161 that Angney Lal had come to village Kakupur for inaugurating Kharanja road. It was also not stated in the F.I.R. that Angney Lal had come to Kakupur on 3.7.1977 to inaugurate kharanja road and programme was settled there that all of them would go to Sandila on 5.7.1977. The learned Sessions Judge has discussed this point but failed to appreciate that improvement at the stage of trial was not to be accepted. So, there was an apparent infirmity in the prosecution case, which the prosecution tried to meet unsuccessfully. This circumstance as put by Sri Nagendra Mohan creates a reasonable doubt about the correctness of the prosecution version.

16. There is no doubt that Natha (P.W. 2) received injuries during the course of the same occurrence and so his presence at any such occasion cannot be doubted. The question, however, remains, whether his evidence as regards the participation of the accused in the commission of the crime in question, should be believed or not.

17. Sri Nagendra Mohan has argued that there is ample evidence on record to show that statement of Natha was recorded on the same day at P.H.C. Kothawan by Dr. Sironjia, but the prosecution has suppressed this statement perhaps because the same did not support the F.I.R. version. Sri Mohan submits that if it is found that statement of Natha as regards the occurrence, was recorded on the same day at P.H.C. Kothawan and if the same has been kept away from the Court, then a reasonable doubt is created about the correctness of the prosecution version. He says that it is just possible that Natha could not name the culprits in that statement and so the same was not produced before the Court.

18. No doubt, if this Court finds that any statement of Natha was recorded on 5.7.1977 at P.H.C. Kothawan, then it will be difficult to sustain the finding of guilt and the Court will have no option but to reject the prosecution story, insofar as the involvement of the named accused is concerned. The learned Sessions Judge has not attached any importance to such argument and has disbelieved Dr. Saxena (D.W. 8), who deposed on oath that statement of Natha was recorded in his presence and his signatures (signature of the witness) were also obtained by Dr. Sironjia. The learned Sessions Judge has given reasons for not believing Dr. Saxena. The learned Counsel for the State has said that Dr. Saxena has rightly been disbelieved and the story as regards recording of the dying-declaration of Natha, has no legs to stand.

19. We have carefully gone through the entire evidence on the point including the statement of Dr. Saxena (D.W. 8). We do not agree with the learned Sessions Judge that the evidence of Dr. Saxena is not convincing. Simply because Dr. Saxena is a defence witness or simply because he charged T.A. for whole of the day, his evidence cannot be disbelieved. The reason is that he is consistent from the very beginning that injuries of Natha were examined in his presence and his statement was also recorded by Dr. Sironjia and his signatures (signature of the witness) were also obtained on that dying declaration. Dr. Saxena has stated that after about 10 or 12 days when the police came to him he clearly told them that the injury report of Natha and his dying-declaration were with Dr. Sironjia, who was not present at P.H.C. and the same could be had from him.

20. Sri B. N. Misra, the second Investigating Officer has stated in para 17 that Natha told him that his dying declaration was recorded by the doctor at P.H.C. Natha tried to resile from this version when he came in the witness box. Dr. Sironjia (P.W. 13) has also denied to have recorded any such statement of Natha, but it is surprising that he took more than two months in replying to the Investigating Officer Sri Misra about the non-existence of dying declaration. There appears to be some substance

in the story that statement of Natha was recorded at P.H.C. Kothawan. It is surprising that the injury register brought by Dr. Sironjia before the Court at the time of his evidence, started with the injuries of Natha.

21. In the face of all this, it would not be proper to disbelieve Dr. Saxena on the point that dying-declaration of Natha was recorded in his presence by Dr. Sironjia on the same date. We find good reasons to place reliance on his statement. The mere fact that he charged some T.A. for being out on tour, is not sufficient to disbelieve Dr. Saxena. There appears to be a ring of truth that statement of Natha was recorded at P.H.C., Kothawan. Suppression of this dying-declaration creates a reasonable doubt about the correctness of the prosecution version and about the correctness of the version of Natha.

22. Natha (P.W. 2) had stated in para 12 that all the 11 accused were firing from a distance of 8-9 paces and after receiving injuries in the jeep he rushed to his safety and took shelter by the side of wall of the clinic of Dr. Ram Prasad. He has further deposed that a lot of blood had dropped on the ground, where he was standing near the building of Dr. Ram Prasad. Surprisingly enough no such blood or trail of blood was found at that place so as to support him that he remained at that place and from there he saw the assailants.

23. It appears to us that he ran away from the place of occurrence on the explosion of bombs and he had no opportunity to identify the real assailants. He concedes in para 16 that there was a lot of smoke on the explosion of bombs and taking advantage of smoke screen he ran away from the spot. Looking to the number and nature of injuries suffered, it is also not believable that Natha could notice as to who of the assailants, was armed with rifle and who with gun.

24. It has come in evidence that Chhotey Lal and Chhunnan Singh were occupying the front seat of the jeep at the time bombs were thrown and firing was opened. Angney Lal was standing by the side of the driver's seat. It is said that driver was also occupying a seat. It is surprising that Chhotey Lal and Chhunnan Singh received fatal injuries but neither driver Shripal nor Angney Lal received even a scratch.

25. The statement of Natha u/s 161 of Cr. P.C. was recorded after about a week and there is no plausible explanation for this delay. We have sufficient reason to say that Natha was left with no option but to toe the tailored F.I.R. and to deny his dying declaration.

26. Presence of Yogendra Pratap Singh (P.W. 1) and Angney Lal (P.W. 3) at any such occasion appears to be doubtful as none of them received any injury. The story that at the relevant time Akhandanand Singh had gone to ease himself and first informant and others had gone to take betel-nut at the nearby shop, does not inspire confidence. It appears to have been introduced with certain purpose so as to make them available for evidence.

27. We are of the view that evidence of all these three witnesses of fact is not above board as regards the participation of these named Appellants. As stated earlier, Appellant Ashok was hardly 16-17 years of age. When his father Suresh, S/o Ram Charan was already participating in the commission of the crime, as alleged, where was the occasion for his father to take his minor son with him for the purpose. Likewise, Appellant Ram Jivan was hardly 19 years of age. His father Ram Lautan was already a member of unlawful assembly, as alleged, then where was the need for Ram Lautan to take his young son and to put his life in jeopardy by facing retaliation or counter-attack. After all, Chhunnan Singh was not empty handed and possibility of fire-arm with him was there. In these circumstances, inclusion of Ashok and Ram Jivan in the list of offenders along with their fathers also reveals that the real assailants could not be identified and these accused were named for one reason or the other.

28. We do not propose to enter into the defence papers which have been filed with a view to show ill-will or enmity with the complainant or the witnesses, etc. When the prosecution itself failed to establish its case beyond all reasonable doubt, the accused had not to explain as to why they had been falsely implicated. The burden is on the prosecution to establish its case beyond all reasonable doubts. The burden is not on the accused to prove their innocence.

29. The charge against Chhotey Lal was that he dishonestly retained DBBL gun No. 4299 belonging to Muneshwar Pandey, knowing that the same had been stolen in the occurrence of 5.7.1977 and it was said that this gun was recovered from his possession on 8.8.1977 by S.O. Sandila, Sri R. S. Bora in presence of Sher Ali (P.W. 6). The learned Sessions Judge has believed Sher Ali (P.W. 6) and Sri Bora (P.W. 7). The learned Counsel for the Appellants has argued that this evidence should not have been believed and no finding of guilt should have been recorded u/s 411 of I.P.C.

30. Sher Ali concedes in the very opening of his cross-examination that in a case u/s 379/411 of I.P.C. against Chhotey Lal, his brother Sharifuddin was a witness. He further concedes that he has already appeared as a witness in cases of Chandrabhal, Muneshwar and Vijai Singh. He admits in para 9 that he has to appear as a witness in a case against Ram Charan. He goes on to say that some of the cases were u/s 25 of Arms Act.

31. This much is clear that this Sher Ali appears to be stock or a pocket witness of the police and is ready to be there at every beck and call. The fact that Sri Bora (P.W. 7) selected such a person as witness for the purpose of witnessing the recovery of the gun from Chhotey Lal, makes the whole story of recovery unacceptable. After all, why independent and reliable witnesses could not be had and why Sri Bora was compelled to rely on such a professional witness. This aspect of the matter also affects the credibility of Sri Bora on the point of recovery of gun. He deposes that at time when he was going back to Sandila he saw the present Appellant Chhotey Lal with a gun and on chase being given he was arrested and gun was recovered. His

sole evidence uncorroborated by evidence of any independent, reliable witness, cannot be treated to be sufficient to record the finding of guilt against the Appellant Chhotey Lal.

32. We hold that prosecution has failed to establish its case beyond all reasonable doubt against the surviving Appellants and all of them are entitled to acquittal.

33. Criminal Appeal Nos. 549 of 1980, Dalai v. State ; 606 of 1980, Chhotey Lal v. State and 510 of 1980, Suresh and Ors. v. State, insofar as surviving Appellants are concerned, are hereby allowed and the conviction and sentences of the respective Appellants are hereby set aside and they are acquitted of the charges framed against them. They are on bail. They need not surrender. Their bail bonds are cancelled and sureties discharged

34. Let the record received from the trial court be sent back to it along with a copy of this judgment.