

(2014) 05 AHC CK 0233

Allahabad High Court

Case No: Criminal Appeal No. 1607 of 1985

Siraju

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: May 20, 2014

Acts Referred:

- Arms Act, 1959 - Section 25
- Criminal Procedure Code, 1973 (CrPC) - Section 161
- Penal Code, 1860 (IPC) - Section 147, 148, 149, 307

Citation: (2014) 3 ACR 2791 : (2014) 6 ADJ 71

Hon'ble Judges: Vinod Prasad, J

Bench: Single Bench

Advocate: R.K. Shanglo, Anand Shanker Mishra and Rakesh Singh Sengar (A.C.), Advocate for the Appellant

Final Decision: Allowed

Judgement

Vinod Prasad, J.

This appeal by the two appellants Siraju and Rabbani is directed against the impugned judgment and order dated 16.5.85 passed by Sessions Judge, Muzaffarnagar in S.T. No. 13 of 85 connected with S.T. No. 14 of 85 by which, the appellant Siraju was convicted under Sections 148, 307/149 I.P.C. and 25 Arms Act. Appellant Rabbani was convicted under Sections 147, 307/149 I.P.C. Sentence of both the appellants were directed to run concurrently.

Pending final outcome, one of the appellants Siraju expired and his appeal already stands abated vide judgment and order dated 25.3.2014. The appeal of only appellant Rabbani has to be considered.

Since none was present on his behalf, Sri Rakesh Singh Sengar, learned counsel was appointed as amicus curiae to assist the Court in disposal of the appeal of surviving

appellant Rabbani.

According to the prosecution charge, Rais was sleeping inside his house on the intervening night between 29/30.8.1984 when at 12.30 p.m., he heard some sound and opened the door. He found 6 or 7 persons were standing in the front of his house armed with fire-arms (guns and pistols), knives and clubs. One of the miscreants gave a club blow to Rais on his head. Shrieks of Rais attracted Nisar, Manzoor Khan (P.W. 6) and others at the incident scene. The miscreants resorted to firing towards the witnesses causing injuries to Nisar and Manzoor Khan. One of the miscreants Siraju armed with knife (material exhibit 1) was apprehended at the spot but remaining miscreants made their escape good in the darkness,

2. Police was informed on telephone regarding which GD entry was made, which is Ext. Ka-2. SI Tej Singh and constables came to the incident spot, took possession of the arrested accused and laid search for other miscreants. Nisar injured was dispatched to the hospital for his medical treatment. When the police party returned to the police station alongwith knife and the arrested accused and recovered empty cartridges (material exhibits 2 to 7) found at the spot, prepared recovery memo as Ext. Ka-6, Rais P.W. 3 scribed the FIR and lodged it at the police station and on that basis, chik FIR Ext. Ka-4 and general diary entry Ext. Ka-13 were prepared.

3. Dr. D.C. Jain, P.W. 1 medically examined the injured Nisar. Rais and Manzoor Khan vide their medical examination reports Ext. Ka-2, Ka-3 and Ka-4. Offence was investigated and the site plan Ext. Ka-8 was prepared. Appellant accused Rabbani was arrested on 10.9.84 after a gap of 10 days, was kept under veil and GD entry respecting that, Ext. Ka-14, was prepared. He was dispatched to jail through constable Kailash Chand P.W. 5 vide GD entry Ext. Ka-15. His test identification parade was conducted by Sri Bihari Lal, Special Executive Magistrate, Muzaffanagar on 29.10.84 and said accused was correctly identified during T.I. Parade by Rais and Manzoor Khan, Test identification memo is Ext. Ka-L Completion of the investigation resulted in laying down their separate charge-sheets Ext. Ka-9, Ka-10 and Ka-11 against the accused.

Although the cases of the accused were committed on different dates to the Sessions Court but was registered as S.T. No. 14 of 85, State v. Siraju, connected with S.T. No. 13 of 85, State v. Rabbani.

4. Both the accused were charged with respective offences, which they denied, pleaded not guilty and claimed to be tried.

Two fact witnesses Rais P.W. 3 and Manzoor Khan P.W. 4 were examined during trial as fact witnesses. Bihari Lal, Special Executive Magistrate, P.W. 1 had conducted T.I. Parade, Dr. D.C. Jain P.W. 2 had examined the injured, constable Kailash Chand P.W. 5 had lodged accused Rabbani in jail and SI Tej Singh P.W. 6 is the I.O.

After looking into the evidences, learned trial Judge concluded that prosecution has successfully anointed the charge against both the appellants Siraju and Rabbani and, therefore, convicted both of them under the aforesaid sections and sentenced them accordingly, which has already been recorded in the opening paragraph of their judgment and hence is being eschewed from being repeated.

5. In background of the aforesaid facts, this appeal filed by the two convicted appellants challenging their aforesaid conviction and sentence has been heard. Repeated note is that accused Siraju expired and his appeal already stands abated.

For appellant Rabbani, Sri Rakesh Singh Sengar, learned amicus curiae urged that the appellant is not named in the FIR, his complicity was disclosed through the statement of co-accused, which is inadmissible and, therefore, that cannot be taken to be an evidence against the appellant. It is further submitted that the appellant was put up for test identification and is recognize by two witnesses but during their interrogatory statements, they had not spelt out the features of the appellant Rabbani and, therefore, their test identification is meaningless. Had the identification of the appellant was clear and categorical, these witnesses would have informed the I.O. about the physical features of the appellant during their interrogatory statements u/s 161 Cr.P.C. That having not been done, it is wholly unsafe and dicey to rely upon the statements of two witnesses alleged to have identified the appellant. It is next submitted that appellant had already served 2 years, 5 months and 12 days in penitentiary and the maximum sentence, which he is required to serve is 3 years and, therefore, in any view, if the appeal of the appellant is not allowed on merits then his sentence should be mollified to the period of imprisonment already undergone by him as the incident is alleged to have occurred on the intervening night between 29/30.8.84 and 30 years have gone by, Appellant has already served 2 years and 5 months imprisonment and that is sufficient. Appellant as on date has become very old and, therefore, no useful purpose will be served in lodging him jail after a gap of three decades.

With the aforesaid submissions, learned amicus curiae urged that the appeal of the surviving appellant Rabbani be allowed and he be acquitted of the charge.

6. Sri Rama Shanker Yadav, learned AGA arguing to the contrary refuted the submissions raised by learned amicus curiae and urged that the complicity of the appellant was surfaced soon after the incident through the statement of co-accused and he was correctly identified by the two witnesses and his identification is good and, therefore, there is credible evidence against the appellant.

7. I have gone through the record of the trial Court and have vetted through the impugned judgment.

From the perusal of the record, it is discernible that the appellant is not named in the FIR. He was not armed with any lethal weapon. His conviction is u/s 147 I.P.C. Victim has not alleged that it was the appellant Rabbani, who had assaulted him

with club. Whether the appellant formed an unlawful assembly with an intention to commit murder of the victim is not discernible nor is surfaced from the record. It is a night incident. No description of the appellant was given by the witnesses to the I.O. at the time of interrogation. In such a view to place reliance upon the test identification parade conducted after a month of the incident is extremely doubtful. Incident had not taken much time and it is difficult to cogitate that the witnesses will have sufficient opportunity to identify all the appellants during night in darkness.

In view of aforesaid, I find it very hazardous to place any reliance on the identification of the appellant. Exculpatory statement of the co-accused is inadmissible in the evidence. It cannot be utilized for any purpose at all and, therefore, the contention of learned AGA that the complicity of the appellant was surfaced through the statement of co-accused is of no value.

Concluding the discussion, I am of the opinion that so far as surviving appellant Rabbani is concerned, prosecution has not been able to bring any cogent and reliable evidence against him. Resultantly, the appeal is allowed. Conviction of the appellant Rabbani is hereby set aside. He is acquitted of the charge. He is on bail, he need not surrender. His bail and personal bonds are hereby discharged.

Let a copy of this order be certified to the trial Court for necessary action.