(2016) 07 AHC CK 0177

ALLAHABAD HIGH COURT (LUCKNOW BENCH)

Case No: Criminal Appeal No. 467 of 2016.

Ram Avtar (Jail Appeal) - Appellant @HASH State of U.P.		APPELLANT
	Vs	
		RESPONDENT

Date of Decision: July 25, 2016

Acts Referred:

- Evidence Act, 1872 - Section 3
- Penal Code, 1860 (IPC) - Section 300, Section 302, Section 34, Section 449

Citation: (2016) 6 AllLJ 283

Hon'ble Judges: Surendra Vikram Singh Rathore and Anil Kumar Srivastava-II, JJ.

Bench: Division Bench

Advocate: Nirmal Singh Yadav, Advocate, for the Appellant; Govt. Advocate, for the Respondent

Final Decision: Allowed

Judgement

Surendra Vikram Singh Rathore, J. - Both the aforesaid criminal appeals arise out of a common judgment, hence the same are being disposed of together.

2. Heard Mr. Umesh Kumar Dubey, learned amicus curiae for appellant Ram Autar, Mr. Nirmal Singh Dubey, learned counsel for appellant Mangu Lal, Ms. Ruhi Siddiqui, learned A.G.A. for the State and perused the lower court record.

3. Criminal Appeal No. 467 of 2016 has been preferred by appellant Ram Autar and Criminal Appeal No. 85 of 2016 has been preferred by appellant Mangu Lal challenging the judgment and order dated 8.1.2016 passed by learned Additional Sessions Judge, Mohammadi Lakhimpur Kheri in Sessions Trial No. 425 of 2007 and Sessions Trial No. 426 of 2007 arising out of Case Crime No. 879 of 2006 under Sections 302 and 449 I.P.C. and Case Crime No. 530 of 2007 under Section 3/25 of the Arms Act, Police Station Pasgawan, District Kheri whereby both the appellants have been convicted under Section 302/34 I.P.C. and have been sentenced with

imprisonment for life and also with fine of Rs. 10,000/- each with default stipulation of two months additional imprisonment. For the offence under Section 449 I.P.C., they were further convicted and sentenced with ten years rigorous imprisonment and also with fine of Rs. 5,000/- each with default stipulation of two months additional imprisonment. Appellant Ram Autar in connected Sessions Trial No. 426 of 2007 was further convicted under Section 3/25 of the Arms Act and was sentenced with three years imprisonment and also with fine of Rs. 2,000/- with default stipulation of one month additional imprisonment. All the sentences were directed to run concurrently.

4. In this case there was one more accused namely, Rameshwar but because of his death during trial, the case against him was abated and only the present appellants have faced trial.

5. In brief the case of the prosecution was that complainant Radhey Shyam lodged an F.I.R. at Police Station Pasgawan on 7.10.2006 at 7:30 a.m. at a distance of 17 km alleging therein that some dispute regarding the passage had taken place with Mangu Lal about three months prior to the incident subsequently the same was settled. In spite of that, these persons were nursing grudge against the complainant. In the intervening night of 6/7.10.2006 at about 12:00 hours complainant, his brother Raghuveer alias Nanhe and his wife Smt. Kanya Devi were sleeping in their "Baggar", appellant Mangu Lal along with Rameshwar (since dead) and Ram Autar trespassed into the "Baggar" of the complainant, Ram Autar and Rameshwar were armed with country-made pistols, Mangu Lal was armed with lathi. Hearing the noise of their movement, these persons got up and in the meantime, accused persons caused the death of Raghuveer by firing on his chest. The complainant and his wife have recognised all the accused persons in the torch light. Hearing the alarm raised by them, the other persons of the village also reached there. After the incident, the accused persons ran away in the southern direction, who were seen by several persons. In the night because of the fear of the accused persons, the complainant could not go to lodge the F.I.R. In the morning, he went to the police station and lodged the F.I.R. On the basis of this F.I.R., the case was registered, investigation proceeded. The inquest proceedings started at 8:00 a.m. and after concluding the same, the dead body was sent for postmortem, which was conducted on 7.10.2006 at 5:00 p.m. As per postmortem report, the duration of death was within one day and following ante-mortem injuries were noted by the doctor:-
"Firearm wound of entry 1.5 cm. X 1 cm x chest cavity deep on middle of chest, 8 cm below supra sternum notch. Blackening, tattooing was present 1 cm around the wound.

On dissection underlying the wound vessels, both pleura, both lungs found lacerated and sternum found fractured on lower end. One litter of clotted blood was found in chest cavity. One conial bullet was recovered from inner muscle on left

scapula. The death is caused due to shock and haemorrhage as a result of ante-mortem injury.

6. During investigation, the Investigating Officer took bloodstained and plain soil and one Tahmad, which was bloodstained and prepared its recovery memo. The place of occurrence was inspected and its site plan was prepared. During investigation, appellant Ram Autar was taken on police remand vide order of the C.J.M. concerned dated 29.3.2007 and thereafter on 30.3.2007, on his pointing out, the weapon of offence, which was a country-made pistol and two live cartridges were recovered from the house of the appellant and its recovery memo was prepared. On the basis of the said recovery memo a separate case under the Arms Act was registered, which has been tried along with the main case.

7. The defence of appellant Ram Autar, as stated by him, in his statement under Section 313 Cr.P.C. was that he was not present in the village on the date of incident and he was present in Shahjahanpur at the house of the sister of his mother (Mausi). Appellant Mangu Lal has stated that he has been falsely implicated in this case and he is innocent.

8. In order to prove its case the prosecution has examined PW-1 complainant Radhey Shyam and PW-2 Kanya Devi as witnesses of fact. PW-3 Dr. S.K. Shukla, who has conducted postmortem on the body of deceased, PW-4 Constable Raj Mani Pande, who has prepared chik report and G.D. of this case, PW-5 S.O. Shyam Lal Kashyap, the initial Investigating Officer of this case, PW-6 S.I. Bhagwati Singh, Investigating Officer of the case under the Arms Act, PW-7 Head Constable Ramesh Singh, who has prepared chik report and G.D. of the case under the Arms Act. PW-8 S.I. Ram Shankar Yadav, subsequent Investigating Officer of the main case, who has taken remand of accused Ram Autar and has made recovery of weapon of offence.

9. In defence as DW-1 Ram Pal has been examined, who has stated that on the date of incident at about 12:00 in the night, he heard the noise of weeping from the Baggar of complainant then he along with Ahibaran, Ram Autar (appellant) and Mangu (appellant) went there and found that Raghuveer was lying dead and by the side of the dead body, Radhey Shyam and his wife were sitting. On enquiry, they told that it was dark night and someone has fired and by the time, they got up, the assailant ran away and they could not recognise anyone.

10. After appreciating the evidence available on record, the trial court has convicted the appellants as above, hence both the aforesaid criminal appeals.

11. Submission of learned amicus curiae for Ram Autar was that there were material contradictions in the evidence of the witnesses. PW-2 Kanya Devi has stated that the complainant was searched by the assailants but before that he ran away. The evidence of Radhey Shyam has been assailed on the ground that the incident has taken place in the night. The torch with the help of which, he claims to have seen the incident, has not been produced during trial before the court. Learned amicus

curiae for Ram Autar has also submitted that as per the version of the F.I.R., several other persons had also come to the place of occurrence but in spite of that not even a single independent witness could be examined by the prosecution and on this basis, it has been argued that the prosecution was not successful in proving its case beyond reasonable doubt. There was no motive to commit this offence.

12. Learned counsel for appellant Mangu Lal has submitted that he has been falsely implicated. He is alleged to have armed with lathi only. He has not been assigned the role of firing nor even the role of exhortation has been assigned to him. Thus his participation in this offence was highly doubtful but the trial court has not properly appreciated this aspect.

13. Ms. Ruhi Siddiqui, learned A.G.A. has submitted that there was voluminous evidence against appellant Ram Autar. After taking him on police remand, the weapon of offence was recovered on his pointing out. The accused persons and the witnesses are the resident of same village, therefore, even in dim light, they could have been very easily identified. Non production of torch by itself cannot be the sole ground to disbelieve the entire prosecution case. The complainant and PW-2 are rustic, illiterate witnesses, therefore, minor contradictions in their evidence are bound to occur and on the basis of such minor contradictions, their otherwise reliable evidence cannot be discarded. Learned trial court by a reasoned judgment has convicted the appellant and no interference by this Court is required.

14. Keeping in view the rival submissions of learned counsel for the parties, we will re-appreciate the prosecution evidence. In the instant case, F.I.R. is alleged to have been lodged at 7:30 a.m. while the incident has taken place in the night at 12:00. So there is delay of about seven hours and 30 minutes. This delay has been explained in the F.I.R. itself wherein it has been mentioned that in the night because of the fear, the complainant could not dare to go to the police station. In the circumstances of the case, this explanation cannot be said to be unnatural or illogical. F.I.R. was lodged at a distance of about 17 km. This is the distance of police station from the place of incident as mentioned in the F.I.R. The correct case crime number was mentioned in the inquest report. The postmortem on the body of the deceased was conducted in the same evening at 5:00 p.m., therefore, F.I.R. of this case was lodged with some delay but the delay stands well explained. This point has also not been challenged by the learned counsel for the appellants. The main challenge on behalf of appellant Ram Autar was on certain contradiction in the evidence. The main contradiction as per version of F.I.R. was that he and his wife have seen the three accused persons firing on the deceased while only one firearm injury was found on the body of the deceased. The complainant has specifically assigned the role of firing to appellant Ram Autar. The narration of F.I.R., on which learned counsel for the appellant has placed reliance was virtually the mistake of expression because the complainant was illiterate or little literate. He simply wanted to say that he has seen all the three accused persons and has also seen the incident

of fire on the deceased. So virtually two sentences were wrongly clubbed together and in the perspective of other evidence this variance has no importance.

15. Learned counsel for the appellants has drawn the attention of this Court towards the statement of PW-2 Kanya Devi wherein she has stated that assailants also searched out her husband, but before that he ran away. On the basis of this statement, it has been argued that he ran away prior to the incident but we do not find any substance in this statement because a person who is sleeping in his house would not run away from his house unless and until something happens inside the house. So it was only after the incident when the complainant was searched then he escaped from there. This was the whole intention of PW-2 by giving such statement.

16. Great emphasis has been laid by learned amicus curiae on the point that witnesses have recognised assailants in torch light but the said torch was not taken by the police in custody nor the same has been produced during trial. It was specifically mentioned in the F.I.R. that the assailants were recognised in torch light. PW-1 complainant has stated that he has told the Investigating Officer about the torch that he has seen the incident in torch light and had also shown his torch to Investigating Officer. It is really strange that in spite of that PW-5 Investigating Officer has not inspected the said torch and has not prepared any memo of the same. It is really surprising that not even a single question was put to the Investigating Officer about the non-recovery of torch as to why he has not recovered torch. Thus the Investigating Officer was not given any opportunity to explain as to why torch was not inspected by him and no memo of the same was prepared. In absence of such opportunity being given to witness concerned, the appellants cannot take any advantage of this aspect. Apart from it, when the Investigating Officer has not inspected the torch then virtually it was a defect in the investigation and unless and until the accused can show any prejudice by such defective investigation, the reliable evidence of prosecution witnesses cannot be discarded. On the point of effect of defective investigation, we may refer to the pronouncement of Hon''ble the Apex Court in the case of **Ram Bihari Yadav v. State of Bihar and Ors. reported in AIR 1998 SC 1850**, Hon''ble the Apex Court has observed, that if primacy is given to a designed or negligent investigation, or to the omissions or lapses created as a result of a faulty investigation, the faith and confidence of the people would be shaken not only in the law enforcing agency, but also in the administration of justice.
A similar view has been re-iterated by Hon''ble Apex Court in the case of **Amar Singh v. Balwinder Singh and Ors. reported in AIR 2003 SC 1164**.

Furthermore, in the case of **Ram Bali v. State of Uttar Pradesh reported in AIR 2004 SC 2329**, it was held by Hon''ble the Apex Court that the court must ensure that the defective investigation purposely carried out by the Investigating Officer, does not affect the credibility of the version of events given by the prosecution.

Omissions made on the part of the Investigating Officer, where the prosecution succeeds in proving its case beyond any reasonable doubt by way of adducing evidence, particularly that of eye-witnesses and other witnesses, would not be fatal to the case of the prosecution, for the reason that every discrepancy present in the investigation does not weigh upon the court to the extent that it necessarily results in the acquittal of accused, unless it is proved that the investigation was held in such manner that it is dubbed as "a dishonest or guided investigation", which will exonerate the accused.

17. Reference may also be made to the following pronouncements: **Sonali Mukherjee v. Union of India (2010) 15 SCC 25**; **Mohd. Imran Khan v. State Government (NCT of Delhi) (2011) 10 SCC 192**; **Sheo Shankar Singh v. State of Jharkhand and Anr. AIR 2011 SC 1403**; **Gajoo v. State of Uttarakhand (2012) 9 SCC 532**; **Shyamal Ghosh v. State of West Bengal AIR 2012 SC 3539**; and **Hiralal Pandey and Ors. v. State of U.P. AIR 2012 SC 2541**).

18. Learned amicus curiae has also argued that in this case not even a single independent witness of the village could be examined. In this case the incident has taken place inside the house when the deceased was sleeping in his house along with two witnesses, therefore, in such circumstances, the inmates of the house were the most natural witness and they have supported the prosecution case. So their otherwise reliable evidence cannot be discarded on the ground that independent witnesses of the incident have not been examined. It is the quality of a witness and not the quantity that matters. There was recovery of weapon of offence on the pointing out of appellant Ram Autar. It has also come in the evidence that the fire was shot from a very close range and this statement stands fully corroborated by the medical evidence wherein only one gunshot injury was found on the chest of the deceased. There was blackening and tattooing around the wound and underlying bones were fractured and underlying organs were also damaged.

19. The main argument of learned counsel for the appellants was that there are contradictions in the evidence of the witnesses but we found that PW-2 Kanya Devi was absolutely illiterate lady as she has put in her thumb impression on her statement. Apart from it, PW-1 also happens to be little literate as he was capable of only signing because he has not scribed the F.I.R. himself and has only signed it. Law is settled on the point that the evidence of a rustic and rural witness has to be appreciated in a different manner. Their evidence cannot be appreciated in the same manner as the evidence of an educated and literate witness is examined. This point has been considered by Hon''ble the Apex Court in the case of **State of U.P. v. Krishna Master and others reported in (2010) 12 SCC 324** and in paragraph no. 24 of the said judgment has observed as under:-

"The basic principle of appreciation of evidence of a rustic witness who is not educated and comes from a poor strata of society is that the evidence of such a witness should be appreciated as a whole. The rustic witness as compared to an

educated witness is not expected to remember very small detail of the incident and the manner in which the incident had happened more particularly when his evidence is recorded after a lapse of time. Further, a witness is bound to face shock of the untimely death of his near relative(s). Therefore, the court must keep in mind all these relevant factors while appreciating evidence of a rustic witness."

This point was also considered by Hon''ble the Apex Court in its earlier judgment in the case of **State of Punjab v. Hakam Singh reported in 2005 (7) SCC 408**, wherein Hon''ble the Apex Court has observed as under:-

"We fail to understand the manner in which the testimony of this witness has been appreciated by the High Court. Sometimes while appreciating the testimony of rustic villagers we are liable to commit mistake by loosing sight of their rural background and try to appreciate testimony from our rational angle."

20. So far as appellant Ram Autar is concerned, he has taken a plea of alibi in his statement under Section 313 Cr.P.C. wherein he has stated that he was at the house of sister of his mother (mausi) in Shahjahanpur. But it is really strange that even the sister of his mother could not be produced by appellant Ram Autar in his defence. DW-1 Ram Pal has given an absolutely contrary evidence to the plea of alibi. The evidence of DW-1 Ram Pal clearly establishes the date, time, place of occurrence, presence of two eye-witnesses and also the presence of Ram Autar and Mangu Lal in the village. Thus the defence evidence produced on behalf of appellant Ram Autar was absolutely contrary to his plea of alibi. Apart from it, the evidence of Ram Pal was only hearsay and he has stated that he was told by the complainant that he could not recognise any person. It transpires from the perusal of the evidence that no question was put to PW-1 complainant and PW-2 Kanya Devi that just after the incident, DW-1 Ram Pal reached there and they told him that the offence was committed by some unknown person. Thus the defence evidence was totally an afterthought.

21. It has also been argued that as per the evidence of PW-1 complainant, all the three members were sleeping on different cots. However, Investigating Officer, who has inspected the place of occurrence and has prepared site plan, has not shown any cot lying in the house. As discussed earlier, this is again a defect of the investigation. PW-5 Investigating Officer has stated that at the time of preparation of the site plan only one cot was lying and bloodstained lungi was lying on the said cot. But as discussed earlier that DW-1 Ram Pal has also admitted the presence of these two eye-witnesses at the place of occurrence just after the occurrence, therefore, the presence of these two witnesses has not been challenged and the presence of the inmates of the house in the night was most natural. On this point reference may be made to the pronouncement of Hon''ble the Apex Court in the case of **Thangaiya v. State of T.N. reported in (2005) 9 SCC 650** wherein Hon''ble the Apex Court in paragraph no. 8 has held as under:-

"8..... If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passers-by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere "chance witnesses". The expression "chance witnesses" is borrowed from countries where every man''s home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man''s castle. It is quite unsuitable an expression in a country where people are less formal and more casual, at any rate in the matter of explaining their presence. ....."

(emphasis added)

22. The place of occurrence must have been inspected at about 8:00 a.m. in the morning i.e. after about 8 hours of the incident. If during this period any person has removed the cots then it cannot be any ground to discard the otherwise reliable any evidence of the prosecution. So absence of the two cots at the place of incident does not adversely affect the case of the prosecution in the peculiar facts of this case.

23. Specific role of firing on the deceased was assigned to appellant Ram Autar. In our considered opinion, so far as appellant Ram Autar is concerned, his appeal sans merits and deserves to be dismissed.

24. On behalf of appellant Mangu Lal, it has been argued that no role was assigned to him. He was assigned to be armed with only lathi. There was no allegation that lathi was hurled by him on the deceased. There was no evidence that any exhortation by Mangu Lal was made. In this perspective, it has been argued that involvement of appellant Mangu Lal appears to be doubtful as he has not been assigned any overt act in this incident and enmity has been alleged with him in the F.I.R., so his false implication due to enmity cannot be ruled out.

25. Learned A.G.A. has also admitted that as per prosecution evidence absolutely no overt act has been assigned to appellant Mangu Lal and he was not even armed with any deadly weapon.

26. At this stage, we would like to discuss the legal position on the point as to when common intention can be inferred and accused can be convicted. In the case of **Pasupuleti Siva Ramakrishna Rao v. State of Andhra Pradesh and others reported in (2014) 5 SCC 369** Hon''ble the Apex Court in paragraph no. 10 has held as under:-

"10. The Trial Court correctly appreciated the evidence and rejected the argument that the other witnesses were not reliable because they were interested witnesses. As regards charge under Section 34 Indian Penal Code, the Trial Court relied on the settled position in law that it is not necessary that there should be a clear positive evidence about the meeting of mind before the occurrence and that if there are more than one accused a common intention to kill can be inferred from the circumstances of the case. The prosecution need not prove the overt act of the

accused. ....."

This aspect was again considered by Hon''ble the Apex Court in the case of **Goudappa and others v. State of Karnataka reported in (2013) 3 SCC 675** in paragraph Nos. 22 and 23, which read as under:-

"22. We have bestowed our consideration to the rival submissions and the submission made by Ms. Shenoy commend us. Ordinarily, every man is responsible criminally for a criminal act done by him. No man can be held responsible for an independent act and wrong committed by another. The principle of criminal liability is that the person who commits an offence is responsible for that and he can only be held guilty. However, Section 34 of the Indian Penal Code makes an exception to this principle. It lays down a principle of joint liability in the doing of a criminal act. The essence of that liability is to be found in the existence of common intention, animating the accused leading to the doing of a criminal act in furtherance of such intention. It deals with the doing of separate acts, similar or adverse by several persons, if all are done in furtherance of common intention. In such situation, each person is liable for the result of that as if he had done that act himself. Section 34 of the Indian Penal Code thus lays down a principle of joint criminal liability which is only a rule of evidence but does not create a substantive offence. Therefore, if the act is the result of a common intention that every person who did the criminal act share, that common intention would make him liable for the offence committed irrespective of the role which he had in its perpetration. Then how to gather common intention? The common intention is gathered from the manner in which the crime has been committed, the conduct of the accused soon before and after the occurrence, the determination and concern with which the crime was committed, the weapon carried by the accused and from the nature and injury caused by one or some of them. Therefore, for arriving at a conclusion whether the accused had the common intention to commit an offence of which they could be convicted, the totality of circumstances must be taken into consideration.

23. Bearing in mind the principle aforesaid, when we proceed to consider the case of these two Appellants namely, accused No. 3 Goudappa and accused No. 4 Channappa alias Ajjappa, we have no hesitation in coming to the conclusion that the deceased Channappa was done to death in furtherance of their common intention. All the accused had assembled at one place and the moment deceased came out of the house to spit, one of the accused started abusing him. They were armed with axe and jambia and by catching and immobilising the deceased these two accused facilitated the assault by accused No. 5. Accused No. 5 stabbed the deceased with jambia over the left side of the chest and the blow was so severe that it penetrated into the heart and liver. The fact that these Appellants held the deceased and facilitated the other accused to give the fatal blow and made no effort to prevent him from assaulting the deceased leads to irresistible and inescapable conclusion that these two Appellants shared the common intention with accused No. 5. The

intention of accused No. 5 is clear from the nature of weapon used and the severity of attack which was in the area of chest penetrating deep inside up to heart and liver which caused the death of the deceased."

In the case of **Raju alias Devendra Choubey v. State of Chhattisgarh reported in (2014) 9 SCC 299** Hon''ble the Apex Court in paragraph no. 23 has held as under:-

"23. It is settled law that common intention and conspiracy are matters of inference and if while drawing an inference any benefit of doubt creeps in, it must go to the accused vide **Baliya v. State of M.P. (2012) 9 SCC 696**."

27. Therefore, the common intention is a state of mind of an accused, which can be inferred objectively from his conduct displayed in the course of commission of crime as also prior and subsequent attending circumstances. Mere participation in the crime with others is not sufficient to attribute the common intention to one or others involved in the crime. The subjective element in common intention therefore should be proved by objective test.

28. Thus the above-mentioned pronouncement of Hon''ble the Apex Court leads to the conclusion that whether the accused persons shared common intention depends on the facts and circumstances of each case. The weapon carried by the accused and the role played by the accused are also a factor to determine whether the accused shared common intention or not. When we examine the facts of the instant case in the perspective of the afore-mentioned legal position, then it is clear that there was absolutely no allegation that appellant Mangu Lal carried any deadly weapon. He was only armed with lathi. No attempt was made by him to give any blow of lathi nor even he has exhorted the other accused, while it was the allegation of the prosecution that he was nursing grudge against the deceased. In this background, such behaviour of appellant Mangu Lal creates doubt regarding his participation in the incident and also shows that in spite of his enmity he has not taken any part in the incident. It is very unnatural that in the background of the previous enmity as set forth by the prosecution appellant Mangu Lal had arrived at the scene of occurrence with an intention to murder and he has not used his weapon which he had brought with him to cause injury. This aspect creates doubt on the participation of appellant Mangu Lal.

29. Perusal of the site plan shows that house of the complainant is towards north of his "Baggar" across the main passage and house of Mangu Lal is in front of Baggar of the deceased. The place of incident as shown in the site plan was a Chhapper wherein no doors were fixed, which was adjacent to the open courtyard of "Baggar" of the complainant and Chapper of Mangu Lal is also in front of the said "Baggar". There was dispute of passage as alleged by the prosecution, so the possibility to falsely implicate him without sparing the real assailants cannot be ruled out. Therefore, we are of the considered view that benefit of doubt must go to appellant Mangu Lal.

30. In view of the discussion made above, Criminal Appeal No. 467 of 2016 preferred by appellant Ram Autar deserves to be dismissed and is hereby dismissed. Appellant Ram Autar is in jail. He shall serve out the sentence as awarded by trial court.

31. Criminal Appeal No. 85 of 2016 preferred by appellant Mangu Lal deserves to be allowed and is hereby allowed. Appellant Mangu Lal is in jail. He shall be released forthwith, if not wanted in any other case.

32. Office is directed to certify this order to the court concerned forthwith to ensure compliance and also to send back the lower court record.