Neutral Citation No. - 2023:AHC-LKO:75070

“A.F.R.”

Judgment reserved on 21.07.2023

Judgment delivered on 09.11.2023

Court No. - 29
Case :- CRIMINAL APPEAL No. - 766 of 2000
Appellant :- Phullan And 3 Others.
Respondent :- State of U.P.
Counsel for Appellant :- Imtiyaz Murtaza,Sumit Kumar Srivastava
Counsel for Respondent :- Govt.Advocate

Hon'ble Mrs. Renu Agarwal,J.

1 Heard Sri Sumit Kumar Srivastava, learned counsel for the applicants, Sri Ajay Kumar Srivastava, learned AGA for the State and perused the material available on record.

2. Present appeal has been preferred by the appellants against the judgment and order dated 01.08.2000, passed by Vth Additional Sessions Judge, Pratapgarh, in Session Trial No.57 of 1997, whereby the appellants have been convicted under section 307 IPC read with section 34 IPC and all the appellants except appellant Mausim Ali, have been sentenced to under go rigorous imprisonment of 7 years and payment of the fine of Rs.2,000/- each and further to under go imprisonment of 3 years in default of payment of fine and the appellant Mausim Ali is convicted under section 307 IPC read with section 37 IPC and sentenced to pay the fine of Rs.2,000/- and in default of payment of fine to undergo further imprisonment for a period of 3 months. During the pendency of appeal the appellants Hashim Ali son of Mausim Ali and Maushim Ali(appellant nos.2 and 4) have died and appeal was abated on their behalf vide order dated 26.08.2022. Appellants Mohd. Idris and Phullan son of Mausim Ali were released on bail.

3. Wrapping the facts in brief, on 16.07.1996 at about 9.00 A.M., when the informant(Abdul Hamid) was planting the

paddy in his fields the accused-appellants Mausim Ali and Hashim Ali, Phullan and Mohd. Idris sons of Maushim Ali, assaulted him with lathi-danda and fire arm due to old animosity. He tried to escape towards his house, but Hashim, Phullan and Mohd. Idrish started firing and his brother Abdul Wahid(P.W.-1) stuck in the fields, filled with water. The fire, shot his bother, when he raised noise the witnesses Bachai, Hatim Ali, Sabit Ali, Iddu @ Neta, reached there and challenged the accused, then all of them went to their house.

4. On the basis of a written report FIR was registered in Police Station Kotwali, Pratapgarh, as Case Crime No.569 of 1996, under section 307 IPC. Chik report was prepared at the same time and entered into G.D. The investigation was conducted by S.I. Rajesh Kumar Singh(P.W.-5), got the injured medically examined in the hospital, inspected the spot and prepared site plan on the pointing out of informant Abdul Hamid. He recorded the statement of informant Abdul Hamid and witnesses. The statement of injured Abdul Wahid could not be recorded on that date, due to his injuries. He recorded the statement of injured on 18.07.1996 when he became normal to give his statement. After collecting sufficient evidence against the accused-appellants, investigating officer submitted charge sheet in the court.

5. The Magistrate took the cognisance of the case and after compliance of provisions section 207 Cr.P.C., committed the case to the court of session for trial. The charges were framed against the accused-appellants under section 307 IPC. and read over & explained to the accused persons, who abjured from the charges and claimed to be tried.

6. Prosecution adduced 5 witnesses to prove the case against the accused-appellants, which are as follows:-

(I) P.W.-1, Abdul Wahid (Injured)

(ii) P.W.-2, Sabit Ali (Witness)

(iii) P.W.-3, Dr. P.K. Agarwal (Witness)

(iv) P.W.-4, Dr. V.K. Verma (Radiologist)

(v) P.W.-5, Investigating officer

7. Besides oral evidence, few documentary evidences were also produced by the prosecution, which are as follows:-

(I) FIR (Ex.Ka-1)

(ii) Medical examination report (Ex.Ka-2)

(iii) Radiological report (Ex.Ka-3)

(iii) Site plan (Ex.Ka-4)

(iv) Charge sheet (Ex.Ka-5)

(v) Chik report (Ex.Ka-6)

(vi) G.D. (Ex.Ka-7)

8. After the conclusion of evidences, the statement of appellants were recorded under section 313 Cr.P.C. All the accused deposed in their statements recorded under section 313 Cr.P.C. that they are innocent and they have been falsely implicated in the present case by the informant, as his father was in police department. All the accused denied the incident and stated that the case was registered on the basis of forged written report and witnesses deposed due to animosity and witness Iddu Neta has expired. All the appellants have stated that Mausim Ali was acquitted of the incident of Kaddipur assault. Accused confessed that Idris, Phullan and Mussim Ali were charged and tried in abduction case. Accused have states that Phullan and Idris were tried under section 307 IPC and also for firing in Ramleela ground, but they have been acquitted of the offence under section 307 IPC and section 25 Arms Act.

9. After hearing the public prosecutor and the counsel for the accused-appellants, learned trial court relied upon the prosecution version and held that the FIR is prompt, accused

and informant are resident of the same village, therefore, they are well acquainted with everyone. Medical report corroborates the prosecution version, therefore, prosecution case is proved beyond reasonable doubt. It is also held by the trial court that if the injured witness appeared in the dock and proved the case as a ocular witness then the motive of assault becomes negligible and irrelevant. Abdul Hamid who was informant of the case expired during the trial, therefore, he could not be produced as prosecution witness, however the injured Wahid proved the prosecution version. On the basis of the evidence on record, learned trial court convicted all the four accused under section 307 read with section 34 IPC and punished them with the aforesaid conviction. Aggrieved with the aforesaid judgment the present appeal is filed by the appellants.

10. I have heard the counsel for the appellants, learned AGA for the State and perused the record.

11. It is submitted on behalf of the appellants that impugned judgment and order dated 01.08.2000 is illegal, unjust and improper. Medical evidence has not supported the prosecution version. There are major inconsistencies and contradictions in the statements of the witnesses. Investigation of the case is tainted and prosecution has failed to prove their case beyond reasonable doubt. Trial court did not consider their defence while passing the impugned judgment, hence the impugned judgment is liable to be set-aside.

12. Per contra, learned AGA for the State submitted that the injured witness Abdul Wahid is produced as P.W.-1 and he proved the prosecution version and his injuries very well supported by medical evidence which is proved by Dr. P.K. Agarwal(P.W.-3). FIR is prompt and there is no possibility of addition or concoction or distortion, in the contents of FIR. Hence the impugned judgment is based on reliable evidence of facts hence appeal is liable to be rejected.

13. Before analysis of the evidence it is desirable to recapitulate the evidence on record. P.W.-1 Injured, Abdul Wahid stated on oath that on the date of incident at about 9.00 A.M. he alongwith his brother Abdul Hamid were planting the paddy and the fields were filled with water. They were on the western boundary of their fields. The accused-appellants Mausim Ali, Hashim Ali, Phullan and Idris started assaulting them with lathi-danda and fire arms due to old animosity. He alongwith his brother tried to escape towards his house, but he could not escape. Accused surrounded them from three sides and opened fire. He sustained injuries in the left side of shoulder blade, neck upper arm and chest. Hearing the noise of firing his brother came back and raised alarm, then witnesses Bachai, Hatim Ali, Sabit Ali, Iddu Nata, arrived there and accused took to their heels. His brother Abdul Hamid scribed FIR near the Kotwali Sadar and FIR was registered on his application. He was medically examined by the doctor and his statement was recorded by the investigating officer on the third day of the incident. Informant Abdul Hamid died during course of trial, therefore, he could not appear to deposed in court and FIR was proved by the injured as secondary evidence.

14 P.W.-2, Sabit Ali, who is maternal uncle of the injured, deposed that he proceeded to Hakim Ke Purwa by Jeep from his house, as his house is 12 miles away from the place of occurrence. He left his Jeep near toll and thereafter he proceeded on foot to Kadipur via chowk and jail road. Thereafter, he went to the house of Bachai and alongwith Bachai went towards Hakim Ke Purwa for the purchase of buffalo. When they reached near tube-well they saw that the accused-appellants Mausim Ali, Hashim Ali, Phullan and Mohd. Idrish, having illegal weapons in their hands, opened fire on the injured Abdul Wahid, who fell down in the field. When they scolded the accused-appellants, they took to their

heels towards their house. He accompanied injured Abdul Wahid and informant Abdul Hamid to their house and thereafter went away to purchase Buffalo.

15. P.W.-3 P.K. Agarwal, medical officer appeared in the court and stated that he examined injured Abdul Wahid aged about 32 years, was brought by home guard Prathvipal No.2048, Police Station Kotwali Nagar. The following injuries were found on his body:-

(i) Multiple pellet injuries on left side neck and left side face the area of 12 c.m. X 12 c.m. present and swelling of 0.5 c.m. X 0.5 c.m. circular with piercing lacerated wound at centre .03 c.m. X .03 c.m. circular with fresh oozing and many such injuries hard object (pellets) palpable from above. Total numbers approximately 15 on neck and 15 on face.

(ii) Similar pellet injuries on front of chest and left side on area of 12 c.m. X 12 c.m. upper and left part of the chest alongwith axilla. Total number of injuries about 50, all bleeding

(iii) 7-8 pellets injuries on back of left upper arms.

It is opined by the doctor that all the injuries are caused by fire arm. Duration fresh. Kept under observation. Admitted to district hospital PBH. Referred to surgeon for surgery and radiologist for X-ray of head, neck and chest.

Doctor prepared the injury report and in his statement doctor deposed that general condition of patient was satisfactory, however, air pressure was slightly less in left lungs.

16. P.W.-4 Dr. V.K. Verma deposed that he conducted X-ray of injured Abdul Wahid Contofanic Angle of left lungs was clear. Bones of head and neck were normal. P.W.-4 proved X-ray report and X-ray plate.

17. P.W.-5, investigating officer deposed that after getting investigation of the case he copied FIR and injury report in the

case diary and G.D. He recorded the statement of informant Hamid and inspected the site plan on his pointing out. He could not record the statement of injured Abdul Wahid on that day because he was not fit for recording of his statement. Therefore, he recorded the statement of injured in the third day of the incident. He recorded the statement of witnesses Sabit Ali, Iddu Nata and Bachai. He proved site plan, charge sheet, G.D. and other police papers.

18. F.I.R. reveals that the incident occurred on 16.07.1996 at about 9 A.M. and FIR was lodged at about 9.30 A.M. Therefore, there is no delay in lodging of the FIR and there is no possibility of distortion or concoction in the contents of FIR.

19. It is submitted on behalf of learned counsel for the appellant that medical evidence has not supported the prosecution case. I perused the medical report in the light of other material on record. According to the FIR accused-appellants surrounded Abdul Wahid as he was struck in water filled in the fields and opened fire upon him, which hit in his left shoulder blade, neck upper arms and chest. The contents of FIR are proved by injured witness P.W.-1 and P.W.-2, witness Sabit Ali. No contradiction is found in the statement of injured regarding the injuries. Injuries are corroborated by doctor P.W.-3. There is no contradiction in the statements of witnesses and the statement of doctor regarding the injuries of P.W.-1. P.W.-4 doctor V.K. Verma substantiated the injury report and proved the injuries of P.W.-1. However, he deposed that lungs and bones were not damaged as per X-ray report but he deposed that metallic shadow were found in X-ray on face, neck and chest. P.W.-3 submitted that both the injuries may be caused by one and the same shot of fire. The fire was not opened from the closed range, however, he could not reveal the range of fire. Palpable head pellet injuries were found on the face, neck and chest. Therefore, there is no contradictions in the

statement of doctor, P.W.-3, Radiologist, P.W.-4 and injured P.W.-2.

20. It is submitted that weapon was not recovered from the possession of accused. From the perusal of record it is evident that investigating officer did not recovered the weapon used in the incident. Appellants are not being tried under Arms Act, but no explanation is sought by learned counsel for the appellants during the course of crosses examination of P.W.-5. Recovery of weapon is within the jurisdiction of investigating officer and if investigating officer commits any fault during investigation, it does not extend any benefit to accused, as informant has no control over investigation. Hence if the case is otherwise proved by prosecution, then mere fault at the instance of investigating officer, do not render the prosecution version unreliable.

21. P.W.-5, investigating officer, admitted in his cross-examination that he did not seized blood stain cloths of injured nor he prepared recovery memo thereof. He did inquire about the blood stain cloths from head constable or doctor. This is minor laps on behalf of investigating officer and any laps or latches on behalf of investigating officer in a case of killing by shooting, where the I.O. failed to collect bloodstained soil and empty shells from the scene, do not demolished the complete prosecution version. Since the eye-witnesses deposed to the firing of shots resulting in death, which was corroborated by medical evidence, the loopholes in the investigation do not cause prejudice to the accused. It is held by Apex Court in its Judgment passed in **Maqbool vs. State of A.P., AIR 2011 SC 184** that "*There is no rigid rules to appreciation the evidence. Effect of shortcomings on the part of I.O. is part of task of judge in appreciation of Evidence to assess the effect of shortcomings of I.O. Doctor had proved the injuries of injured, therefore, if the blood*

stain clothes of the injured are not recovered by the investigating officer, it does not mean that no injury was sustained by injured."

22. As the general principle, it can be stated that error, illegality or defect in investigation cannot have any impact unless miscarriage of justice is brought about or serious prejudice is caused to the accused. It is held by Apex Court in its Judgment passed in "**Union of India vs. Prakash P. Hinduja AIR 2003 SC 2612"** that *"If the prosecution case is established by the evidence adduced, any failure or omission on the part of the I.O cannot render the case of the prosecution doubtful".* It is also held by Apex Court in its Judgment passed in "**Amar Singh vs. Balwinder Singh, AIR 2003 SC 1164"** and **"Sambu Das vs. State of Assam, AIR 2010 SC 3300"** that *"If the direct evidence is credible, failure, defect or negligence in investigation cannot adversely affect the prosecution case, though the court should be circumspect in evaluating the evidence".* It is also held by Apex Court in its Judgment passed in "**Ram Bihari Yadav vs. State of Bihar", AIR 1998 SC 1850, "Paras Yadav vs. State of Bihar", AIR 1999 SC 644, "Dhanraj Singh vs. State of Punjab", AIR 2004 SC 1920, "Ram Bali vs. State of U.P. AIR 2004 SC 2329"** that *"If investigation is faulty, illegal or suspicious, the rest of the evidence should be scrutinized independent of the impact of the faulty investigation; otherwise criminal trial will descend to the I.O ruling the roost. Yet if the court is convinced that the evidence of eyewitnesses is true, it is free to act upon such evidence though the role of the I.O in the case is suspicious. An accused cannot be acquitted on the sole ground of defective investigation; to do so*

would be playing into the hands of the I.O. The absence of independent witness of recovery under Section 27, Evidence Act is not sufficient to create doubt regarding truth of the prosecution version."

23. Learned counsel for the appellants argued that investigating officer did not collected blood contaminated water or blood stain earth which goes to show that no such incident happen. This arguments of learned counsel for the appellants finds no favour, as investigating officer himself clear at page-7 of examination that the field were filled with water and paddy was being planted, therefore, it was not possible to collect blood stain water or earth.

24. It is also argued by learned counsel appellants that there is contradiction on the points that whether the place of occurrence was muddy or dry. Learned counsel for the appellants has placed reliance on the page-11 of the statement of P.W.-2, who stated on oath that *"injured did not fall on the field, there was no water or mud and the place of occurrence was dry"*. The contents of learned counsel for the appellants do not find any favour to this contention also, as in the very next line P.W.-2 stated that injured fell down at the very place where the fire hit him. In the site plan, the field is found filled with water. The statement of injured was recorded on 11.11.1999 about three years after the incident. Documentary evidence proved that the fields were under water, as the paddy was being planted at that time. Therefore, this minor contradictions do not destroy the prosecution version.

25. Learned counsel for the applicants argued that P.W.-2 Sabit Ali is the interested witnesses, as he is maternal uncle of injured Abdul Wahid. Sabit Ali, P.W.-2 replied in page-7 of his statement that he is not the real maternal uncle of injured and he is maternal uncle of injured due to village relationship with the injured. Sabit Ali is the eye witness and he deposed that he was going to purchase buffalo alongwith one Bachai of the

village. Injured was surrounded by all the accused having weapons in their hands and fired at Abdul Wahid. He was present near the house of Bachai which is at the distance of one farlong. Mohd. Idrish shot fire from the distance of 6-7 steps. Accused flad towards north of the place of occurrence. The presence of this witness is not doubtful, therefore, his evidence cannot be thrown out, merely on the ground that he is the maternal uncle of the injured, due to village relationship. He accompanied injured Abdul Wahid and informant Abdul Hamid to their house and thereafter went away to purchase Buffalo.

26. Learned counsel for the appellant submitted that P.W.-2 is 85 years old and he admitted that his vision has diminished since the age of 75 years. During the statement this witness could not identify the fingers shown to him, but his statement was recorded about four years after the incident. For the shake of argument, if I disbelieve the evidence of P.W.-2, even then the injured, P.W.-1 himself proved the incident beyond reasonable doubt, which is corroborated by the evidence of P.W.-3, Dr. P.K. Agarwal and P.W.-4, Dr. V.K. Verma, Radiologist.

27. It is further argued on behalf of the accused-appellants that injured was history-sheeter and he must be shot fire by some one else due to rivalry. P.W.-1 injured admitted in his statement that he himself and his brothers Abdul Hamid and Abdul Rashid, were the accused in the case of section 308 IPC, which was filed by the appellant Maushim Ali. Prior to this incident accused-appellants Maushim Ali, Mohd. Idrish and Hashim, assaulted the father of injured Abdul Sakoor and the case is pending in the court of concerned Chief Judicial Magistrate. The accused-appellants were pressurising the informant and injured to withdraw the case which was pending against the accused-appellants and when they refused to do so the present incident had occurred, therefore, there is no

possibility to implicated them falsely without any reason. The enmity is double edged weapon, hence the incident happened due to this enmity. Therefore, the contention of learned counsel for the appellants finds no favour that accused-appellants are falsely implicated in the present case and the incident occurred somewhere else by some other persons.

28. Accused-appellants produced D.W.-1, Head Constable No.38, Om Prakash Shukla, who narrated criminal history of Washir son of Amin, but Washir is neither informant nor witness or injured in this case, therefore, this defence witness is of no use for defence except disclosing criminal antecedents of Washir.

29. Learned trial court found the case proved on the basis of medical evidence, site plan and oral evidence of injured. FIR is prompt. Enmity is admitted. Gunshot injury was found in the body of injured and informant, which is proved by doctor. Therefore, learned trial court found the accused-appellants guilty and convicted them in this case. The conclusion of learned trial court do not suffer with any infirmity or lacuna. The contradictions are minor in nature and the prosecution proved the case beyond reasonable doubt, hence no merit is found in the appeal and the appeal is liable to be dismissed.

30. Lastly, learned counsel for the accused-appellants submitted that all the appellants were charged with section 307 IPC, however, they were convicted under section 307 read with section 34 IPC without amending any charge, therefore, the judgment is liable to be set-aside on this sole ground.

31. So far as section 34 IPC is concerned, it is not substantive offence, which is quoted herein below:-

> *“34. Acts done by several persons in furtherance of common intention.—When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is*

liable for that act in the same manner as if it were done by him alone."

32. Trial court has power to find the accused guilty for lesser offence even if charge is made for major offence, but when the charge was framed for lesser offence the court cannot convict the accused for major offence without alteration of charge. Hence when the prosecution has proved prosecution version regarding major offence under section 307 IPC and it is proved by the evidence that all the appellants acted with common intention then trial court rightly convicted appellants under section 307 IPC read with section 34 IPC. Hence there is no illegality in the judgment of trial court, if the accused-appellants are convicted under section 307 read with section 34 IPC. Therefore, the appeal is liable to be dismissed on this ground also.

33. In view of the aforesaid, the appeal is **dismissed.**

34. Appellant nos.2 and 4 namely Hashim and Maushim Ali are died. The appellant nos.1 and 3 namely Phullan and Mohd. Idris are still alive and are on bail. They are directed to surrender before the court concerned for serving out the remaining sentence, awarded to them by the trial court. The sureties are discharged.

35. Let copy of this judgment alongwith the lower court record, if any, be sent to the trial court concerned for further necessary action and compliance.

(Renu Agarwal,J.)

Order Date :- 09.11.2023
VKG