

Neutral Citation No. - 2023:AHC-LKO:59087-DB
Reserved

Case :- CRIMINAL APPEAL No. - 1674 of 2016

Appellant :- Suhel

Respondent :- State of U.P.

Counsel for Appellant :- Shishir Pradhan, Amresh Kumar, Dinesh Kr. Sharma, Dinesh Kumar, Lok Pati Yadav, Rohit Tripathi, Sajjad Husain, Sunil Kumar Singh, Syed Zulfiqar Husain Naqv

Counsel for Respondent :- Govt. Advocate, Irfan Khan

Hon'ble Pritinker Diwaker, Chief Justice

Hon'ble Om Prakash Shukla, J.

(Per: Pritinker Diwaker, CJ)

1. Sri Rohit Tripathi, Advocate assisted by Sri Sajjad Husain and Syed Zulfiqar Husain Naqvi, appearing for the appellant and Sri Badrul Hasan and Sri Pawan Mishra, learned Counsel for the State.

2. This appeal arises out of the impugned judgement and order dated 15.9.2016 passed by the Additional Sessions Judge, Court No. 5, Barabanki in S.T. No. 555 of 2013 (State vs. Suhel & others), arising out of Case Crime No. 138 of 2013 under Section 302/34 of I.P.C., and Section 5 of Explosive Substances Act, 1908 P.S. Dariyabad, District - Barabanki and sentencing him to life imprisonment with fine of Rs.10,000/- under Section 302 I.P.C., in default of payment of fine, three months additional imprisonment and 10 years rigorous imprisonment with fine of Rs.5000/- under Section 5 of Explosive Substances Act, in default of payment of fine, one month additional imprisonment.

3. As per the prosecution case, on 12.6.2013 at about 1.15 A.M. the accused appellant and acquitted persons, armed with bombs and weapons, entered the dairy of Shafeeq (P.W.2), brother-in-law of Muneer (P.W.1), where the deceased Zaheer (father of the P.W. 1), Muneer (P.W.1) and Shafeeq (P.W. 2) were sleeping, next to each other, and caused various injuries to the deceased, including that of burn injuries caused by explosion of crude bombs. Thereafter, neck of the deceased was also slit by the accused persons.

4. Information was reported to the police by Muneer (P.W.1), son of the deceased vide Exb. Ka 1 and based on which, first information report (Exb.Ka-17) was registered against four persons under Section 302/34 of I.P.C. read with Section 5 of Explosive Substances Act, 1908. Inquest on the dead body was conducted on 12.6.2013 vide Exb. Ka 2 and the body was sent for postmortem,

which was conducted on the same day by Dr. Md. Azam Halafi vide Exb.Ka-16. As per the Autopsy Surgeon, following seven injuries were noticed on the person of the deceased and the cause of death is due to shock and hemorrhage as a result of ante mortem injuries.

“1. Sharp wound cut over chin & lower border of mandible going through from mouth. Hyoid broken. Size 10 cm x 6 cm.

2. Large 15 cm x 4 cm deep reaching upto cervical bone vertebrae C-5 cutting thyroid cartilage muscle legume & GV

3. Large 15 cm x r cm deep reaching upto C6-C5 Cx vertebrae with cutting of all Cx viscera & Cx muscular layer GV cut

4. 15 cm x 8 cm burnt with multiple abraded area on left arm anteriorly starting fr. Top of shoulder SC ecchymosed.

5. Multiple burnt area each 3 cm x 2 cm on burn part of arm left side anteriorly SC tissue ecchymosed.

6. Mutliple burn & abraded area on left forearm anteriorly each 2 cm x 1 cm

7. Multiple burnt & abraded area over left thigh anteriorly 12 in no. each 2 cm x 1 cm in size SC tissue ecchymosed.”

5. While framing the charge, the trial Judge has framed charge against the accused persons under Section 302/34 of I.P.C. read with Section 5 of Explosive Substance Act.

6. So as to hold the accused appellant guilty, prosecution has examined 6 witnesses whereas one defence witness namely, Vijay Prasad has also been examined. Statement of accused persons were recorded under Section 313 Cr.P.C. wherein they pleaded their innocence and false implication and claimed trial.

7. By the impugned judgement and order, the trial Judge has convicted the appellant Suhel under Section 302 of I.P.C. and Section 5 of the Explosive Substances Act, 1908. Hence, this appeal.

8. Counsel for the appellant submits :

(i) that on the same set of evidence, the court below has disbelieved the statements of two alleged eye-witnesses, namely, P.W.1 - Muneer and P.W.2 - Shafeeq in regard to the co-accused but believed the statements of the said two eye-witnesses for convicting the accused appellant;

(ii) that either the statements of P.W.1 Muneer and P.W.2 Shafeeq are to be believed for every accused or else it should be disbelieved for the accused appellant also. In support of his contention, he has placed reliance on the judgment of the Apex Court in the case **Chander Pal vs. State of Haryana**, reported in **(2002) 2 SCC 755** and **Sadananda Mondal vs. State of West Bengal; (2013) 15 SCC 293;**

(iii) that there are material contradictions in the statement of two alleged eye-witnesses, namely, P.W.1 Muneer and P.W.2 Shafeeq and on many points they have given different version, which clearly makes it clear that they are not reliable witnesses;

(iv) that the appellant has been falsely implicated by the complainant because of old enmity between the two brothers with regard to land. Accused appellant Suhel is the son of the deceased and therefore, question of committing murder of his father by the appellant does not arise; and

(v) that no incriminating article has been seized from the possession of the accused appellant to show his involvement. One knife is alleged to have been recovered from the appellant, but the blood on the said knife has been found disintegrated, thus, the seizure cannot be used against the accused appellant. Once the statement of P.W.1 and P.W.2 is not found trustworthy in regard to other accused persons, on the basis of that very statements, the appellant cannot be convicted.

(vi) The appellant has already remained in jail for more than 10 years.

9. On the other hand, supporting the impugned judgement, it has been argued by the State counsel :

(i) that the conviction of the appellant is in accordance with law and there is no infirmity in the same;

(ii) that there is no reason for this Court to disbelieve the statement of P.W.1 and P.W.2, who have categorically deposed against the appellant and showed his involvement in the commission of offence;

(iii) that the appellant has killed his own father, that shows the brutality of the crime, and the mindset of the appellant; and

(iv) that the appellant has been convicted under Section 302 I.P.C. and, therefore, question of his detention period of 10 years will not be of any benefit to him and he has to serve the entire sentence, as imposed by the trial Court.

10. Muneer (P.W.1), in his deposition, has stated that he alongwith his father (deceased), Shaheer (son) and Shafeeq (brother-in-law) were sleeping in the dairy, four - six steps from each other. At about 1.30 a.m. Birju, Indar, Raghunandan and his brother Suhel came in a four wheeler and after getting down from the car, they threw bomb at his father and killed him by sliting his throat. There was a dispute between his father and brother Suhel with regard to the land. His father (deceased) executed a deed of four bighas land in his wife's name for which his brother Suhel was unhappy. At the time of occurrence, the emergency light was switched on and they identified the accused persons in the light of emergency light.

In cross-examination, P.W. 1 stated that he and accused Suhel are real brother. No partition took place with regard to agricultural land but the residential house was partitioned about 11-12 months back. At the time of partition, he, his father, brother Suhel and some villagers were present. Partition took place amicably. He also stated that they have 9 bighas land and they are cultivating the same jointly. He also stated that his father gave half share of the residential house to his brother Suhel and with regard to agricultural land, he asked Suhel to cultivate only his own share but he refused to execute any deed in favour of anyone. Despite that, his father executed a deed of four bighas land in favour of his wife's name. He came to know about execution of the deed later. He cannot recollect as to when the deed was executed. He further stated that his brother Suhel and his wife residing in the village 5-6 months back, prior to the date of occurrence. Earlier they were residing in Kanpur. His father went to his father-in-law house for treatment 5-6 months back, prior to the date of occurrence. When a question was put to P.W. 1 as to from what date he started residing at his father-in-law house, he kept mum for some time and said again that he is unable to recollect it. Another question was put to P.W. 1 with regard to the statement given by him before the investigating officer that due to fear of Suhel, his father was residing at his father-in-law's house, this witness again kept mum for some time.

11. Shafeeq (P.W. 2), in his deposition, stated that the deceased was father-in-law of his sister and Muneer (P.W.1) (husband of his sister) used to look after

him, due to which deceased had transferred four bighas land in his sister's name (wife of Muneer). Accused Suhel along with co-accused Birju, Indar, and Raghunandan had been putting pressure on the deceased to transfer Suhel's share in the land to his name and also extended threat to life. Due to transfer of four bighas land, enmity started between the two brothers, as a result of which in the night of 11 June, 2013 at about 1.15 a.m. while they were sleeping in the dairy, at that time, the accused persons came there, threw bomb at the deceased and started beating him and on exhortation of Indar, Birju & Raghunandan, appellant Suhel killed the father-in-law of his sister by cutting his throat with knife and fled away from the spot.

In cross-examination, P.W. 2 stated that Birju, Indar, and Raghunandan are real brothers and prior to the date of occurrence, he did not know them. He stated that he cannot recollect whether it was a moonlight or dark night on the date of occurrence. Emergency light was hanging from a tree on the western side and the same was on. He also stated that after the bomb exploded, he woke up and saw that dust cover the place of occurrence and therefore, he could not see anything due to the same.

12. Accused appellant, in his statement recorded under Section 313 Cr.P.C., has categorically stated that his brother (P.W.1) by alluring his father got his share in father's property (agricultural land) and transferred to his wife's name and thereafter, wanted to get the remaining land transferred on his name and when the deceased refused to do so, he killed him and lodged the FIR, falsely implicating him.

13. P.W. 4, Dr. Md. Azam Halafi, the Autopsy Surgeon, who carried out the postmortem, proved the autopsy report and opined the cause of death of the deceased as shock and hemorrhage due to ante-mortem injuries. In cross-examination, he has stated that the injuries on the person of the deceased could not be caused due to explosion of bomb and the death occurred on or about the time as set out by the prosecution.

14. Before adverting to the facts of the case, it would be appropriate to refer to the certain decisions governing the field, rendered by the Apex Court.

*" In the case of **Chander Pal Vs. State of Haryana; (2002) 2 SCC 755**, the Apex Court has held as under:*

"14. We will now briefly examine the approach of the learned Sessions Judge in regard to the prosecution evidence as pointed out to us by

learned counsel for the appellants. While discussing the evidence of the prosecution with reference to the acquitted accused, this is how learned Judge considered the prosecution evidence :

"However, the case of prosecution against Dharambir and Dharam Singh was of course symptomatic of deficiencies owing to failure on its (prosecution) part to lead positive and concrete evidence on the point of identity of these two assailants. In the first information report, Ex. PA, Dharam Singh accused was not named as assailant. The name of that assailant was described therein as Biru. It was not at all the case of prosecution that Dharam Singh accused was also addressed by the name of Biru. Both of them were described therein as belonging to Thakur community and residents of Asaoti. However, that version has convincingly been demonstrated on record to be factually incorrect. On the own telling of Bhim Sen (PW 1), he had not mentioned the father's name of either that person named Biru or other accused Dharambir. In his deposition in Court, he (PW 1) had disowned the fact that he had described both the assailants as belonging to Thakur community and residents of village Aasoti but he was duly confronted with that statement, Ex. PA, where they were described as such. Admittedly, he had never visited the house of either Dharam Singh or Dharambir, accused and had also no business dealings with them. He was also frank enough to concede that he had no dealings of any kind with Dharambir, accused. In his statement before the Court, he has no doubt asserted that he had been seeing Dharambir playing Ludo in the company of Chander Pal and Ravinder but had to admit that he had not made any such statement before the police. No evidenciary value could, thus, be attached to the vague and bald statement made by him that he knew both these accused from before. Had that been so, there was no question of his having made an apparent mistake in describing their names, parentage, community or place of residence."

15. If the learned Sessions Judge was justified in rejecting the prosecution evidence based on the reasoning found in the paragraph extracted hereinabove, we fail to understand how the very same evidence could be accepted in regard to the appellants herein. Every one of the reasoning mentioned in the above paragraph of the judgment of learned Sessions Judge, if applied on the same yardstick to the prosecution evidence in regard to the appellants herein, we do not find any symptomatic differences in regard to applying the said evidence to the appellants herein and rejecting the same with reference to the acquitted accused. In our opinion, on the parity of the reasoning adopted by learned Sessions Judge, the case of the appellants could not have been distinguished from those of the acquitted accused persons. It is this fundamental error in the judgment of learned Sessions Judge which has denied the appellants herein the benefit of doubt which should have been made available to the appellants. We need not dwell upon the confirming judgment of the High Court in this regard very much because in our opinion it has merely accepted and confirmed the judgment of learned Sessions Judge without noticing the material discrepancies in the evidence of PWs.1 and 2, without noticing the effect of non-examination of Subhash Baweja and Mohan Lal and without taking into consideration the effect of illegal

detention or arrest of first appellant on 2.8.1992 itself or the reasoning of the learned Sessions Judge while rejecting the prosecution case in regard to the acquitted accused."

*In the case of **Sadananda Mondal vs. State of West Bengal; (2013) 15 SCC 293**, the Apex Court has held as under :*

"14. The courts below, having disbelieved the entire case of the prosecution as regards 13 out of 14 accused persons, on the basis of the same evidence, as rightly pointed out by Mr Ghosh, should not have convicted the appellant when there was no other cogent and convincing evidence against him. In other words, in the absence of any clinching evidence or incriminating circumstance against him, the High Court committed an error in convicting the appellant solely on the basis of the evidence of PW1, who was one of the brothers of the deceased when the other brother viz. PW 3 did not corroborate him, particularly, when the evidence of PW 3 was found by the High Court to be unreliable. Having disbelieved the alleged eyewitnesses while considering the case of other accused persons, in the absence of any reason, the High Court is not justified in accepting the very same statement of the witnesses in the case of the appellant herein."

15. Minute examination of the evidence makes it clear that the prosecution has failed to prove its case beyond all the doubts. Though P.W. 1 & P.W. 2 have been cited as eye witnesses to the incident but merely on the basis of their statement, which does not inspire the confidence of this Court and weak in nature, it will not be safe for this Court to uphold the conviction of the appellant.

16. From the evidence, it is further clear that the prosecution has set up a case that on 12.6.2013 at about 1.15 AM, the accused - appellant and the acquitted accused persons, armed with bombs and weapons, entered the dairy of Shafeeq (P.W. 2) where deceased Zaheer (father of P.W. 1 - Muneer), Muneer (P.W.1) and Shafeeq (P.W. 2) were sleeping. P.W. 1, in his examination-in-chief, has stated that Birju, Indar, Raghunandan and his brother Suhel came in a four wheeler, after getting down from the car, threw bomb at his father and killed him by slitting his throat, whereas P.W. 2, in his examination-in-chief, has stated that the accused persons came at the place of occurrence, hurled bomb at the deceased and started beating him and on exhortation of Birju, Indar and Raghunandan, appellant Suhel allegedly killed his father by slitting his throat with knife. A bare perusal of the aforesaid statements, it reveals that there are material contradictions in the statements of both the witnesses. That apart,

both P.W. 1 and P.W. 2 have stated that they were sleeping four - six steps next to each other and the accused persons hurled bomb at the deceased, but none of them received any injury, which creates doubt about using of bomb in the crime. Further, the Autopsy Surgeon has also opined that the burn injuries found on the person of the deceased could not be caused due to explosion of bomb. Thus, the medical evidence also does not support the prosecution case.

17. We also find substance in the argument of the counsel for the appellant that no incriminating article has been seized from the possession of the accused appellant, showing his involvement, though one knife is alleged to have been recovered from the appellant but the blood on the said knife has been found disintegrated. Further, once the statements of P.W.1 and P.W. 2 are not found trustworthy in regard to the other accused persons, on the basis of that very statements, the appellant cannot be convicted.

18. Thorough examination of the evidence makes it clear that the prosecution has failed to prove its case beyond all reasonable doubts.

19. In view of the aforesaid, we are of the considered view that the Sessions Judge has erred in law in convicting the appellant. Resultantly, the appeal succeeds and is allowed.

20. The judgment and order of the trial court dated 15.9.2016 is set aside. The appellant is acquitted of all the charges for which he has been tried and convicted. The appellant shall be released from jail forthwith, unless required in any other case, subject to compliance of the provisions of Section 437-A Cr.P.C. to the satisfaction of the trial court.

21. Let lower court record along with copy of this order be transmitted to the court concerned for information and follow up action.

Dated : 18.09.2023

nd.

(Om Prakash Shukla, J.) (Pritinker Diwaker, CJ)