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Court : Allahabad

Decided On : May-03-2002

Reported in : 2003CriLJ189

Judge : J.C. Gupta and ;Imtiyaz Murtaza, JJ.

Acts : Indian Penal Code (IPC), 1860 - Sections 100 and 300

Appeal No. : Criminal Appeal No. 1244 of 1981 with Cri Revn. No. 1325 of 1981

Appellant : NaraIn Singh and ors.

Respondent : State of U.P.

Advocate for Def. : A.N. Mulla, ;Ashok Mehta and ;Pathal Singh Chauhan, Advs. and ;A.D. Giri, A.G.A.

Advocate for Pet/Ap. : A.P. Singh, ;S.K. Agrawal and ;Raghuraj Kishore, Advs.

Disposition : Appeal allowed

Judgement :

1. This is an appeal filed by four above named appellants against the judgment and order dated 30-5-1981 passed by the then 1st Addl. District & Sessions Judge, Saharanpur in Session Trial No. 413/79 convicting and sentencing all the appellants to imprisonment for life under Section 302 read with Section 34, IPC. The appellants have further been convicted and sentenced to three years R.I.

each under Section 324 read with Section 34, IPC.

2. The prosecution case in brief is that on 30-3-1979 Kunwarpal deceased of this case was assaulted by appellants Gandhi, Kunwarpal and their brothers Narendra and Jaihind as well as Bhushan-brother of accused Ramesh. A report of this incident was lodged by Kunwarpal deceased and a cross report was lodged by accused Ramesh against deceased Kunwarpal, Vikram and others. It is further alleged that in August 1976 accused Gandhi, Kunwarpal and others had assaulted Charan of Sukharatal leading to their prosecution in which accused Kunwarpal and others were convicted to two months R.I.

3. It is further alleged that on 4-7-1979 at about 5.30 p.m. Shitab Singh, Kunwarpal deceased and Yashpal were going from Nakur to Aasrakheri and when they were in front of the liquor-vend of accused Ramesh to have betels at the stall of Bhoora across the road, all the four appellants who were present at the liquor shop came out, and dragged Kunwarpal deceased inside the liq-uor shop. When Yashpal tried to save Kunwarpal, appellant Gandhi gave him knife blows on his head whereupon Yashpal fell on the ground. Inside the liquor shop Gandhi and Kunwarpal accused assaulted deceased Kunwarpal with knife. While accused Narain Singh and Ramesh who were empty handed held Kunwarpal deceased in their grip. After inflicting two stab injuries on deceased Kunwarpal the accused persons made their escape good through other door of the shop. Deceased Kunwarpal died an instantaneous death. P.W. 2 Prithivi Singh, Satyapal and others also witnessed the occurrence. Shitab Singh got First Information Report scribed by Vikram Singh and lodged it in the same evening at 6.05 p.m.

4. On the basis of written report check FIR Ex. Ka. 13 was prepared and the case was registered in the general diary. After registration of the case investigation ensued. S.I. Baboo Khan was entrusted with the investigation. He proceeded to the scene of occurrence, held inquest on the dead body of Kunwarpal. Dead body was then sent to mortuary for post mortem examination with necessary papers. The I.O. also took into his possession blood stained Chappal and Belt of the deceased through Memo Ex. Ka. 7 and Ex. Ka 8. Blood stained and plain bricks of the floor were also taken into possession. Site plan Ex. Ka 10 was prepared.

Statements or witnesses were recorded. Later on investigation was completed by S.I. B. B. Sharma P.W. 6 who challaned all the four accused persons and sent them for trial.

5. The post mortem examination of the dead body of Kunwarpal was done by Dr. M.N. Ansari P.W. 3 on 5-3-79 at 4.30 p.m. He found following ante-mortem injuries :

1. Incised wound 2 cm x 3/4 cm Scalp deep on right side back of head, 10 cm behind right ear, Margins clean-cut. Direction is from above to downwards.

2. Incised wound 3.5 cm x 1.5 cm x chest cavity deep in left side chest at 10 O'clock position, 4.5 cm from left nipple Margins clean cut. Direction horizontal.

6. In the internal examination, the doctor found cartilage of IInd left rib cut at lower part (lower border) and a cut in pleura of left lung under the IInd left intercostal space; pleura cavity of left side contained about one litre of blood, the upper lobe of left lung had through and through cut corresponding to the cut of pleura under IInd left intercostal space.

7. There was a transverse cut in the pericardium over lying the left part of arch of aorta. Cavity contained about 100 millilitres of blood; left part of arch of aorta also had a transverse cut; both the sides of heart were empty, stomach contained about 250 grams of semi-digested food material; small intestines and bladder were empty and the large intestine was full of faecal matter and gases.)

8. As per the opinion of the doctor death of Kunwarpal deceased occurred due to shock and haemorrhage as a result of ante-mortem injuries caused to his vital organs. Post Mortem Report of deceased Kunwarpal is Ex. Ka. 1.

9. Injuries of Yashpal Singh P.W. 1 were medically examined in the same evening at 6.40 p.m. at Primary Health Centre Nakur by P.W. 4 Dr. Jugal Kishore who found following injuries :

1. Contusion on forehead left side above eye brow 4 cm x 3 cm.

2. Incised wound on left side of scalp on parietal bone area 3.2 cm x 0.75 cm scalp deep.

3. Incised wound on occipital bone area of scalp 1.5 cm x 0.5 cm x scalp deep.

4. Abrasion on web of right thumb and index finger 0.5 x 2 cm on front side.

10. In the opinion of Dr. Jugal Kishore all the injuries of Yashpal were, simple in nature. Injury No. 1 was caused by friction while injuries Nos. 2, 3 and 4 were by sharp edged weapon. All the injuries were fresh in duration.

11. In their statements recorded under Section 313, Cr. P.C. the accused persons denied the prosecution allegations, only Gandhi admitted his presence and put up a counter version of the incident other accused persons denied their presence. Ramesh accused even pleaded alibi.

12. Prosecution in support of its case produced eight witnesses namely P.W. 1 Yashpal Singh, P.W. 2 Prithvi Singh, P.W. 3 Dr. M.N. Ansari who conducted autopsy, P.W. 4 Dr. Jugal Kishore Gupta who medically examined injured Yashpal, P.W. 5 S.I. Babu Khan, the first Investigating Officer, P.W. 6 S.I.B.B. Sharma, Second Investigating Officer, P.W. 7 Vikram Singh, scribe of FIR and P.W. 8 H.C. Sahi Ram Sharma who prepared check FIR and registered the case in the General Diary.

13. Accused persons in their defence produced six witnesses in all.

14. Dr. G.S. Gupta D.W. 2 stated that he had medically examined accused Gandhi on 4-7-79 at 7-05 p.m. in Government Hospital (S.B.D,.) Hospital, Saharanpur) and found following injuries :

1. Incised wound 3.75 x 1 xm on left side back near Inferior angle of scapula transversely. Oblique wound not probed and kept under observation, blood present.

2. Traumatic swelling 5 x 5 cm on left little finger lower part back including base kept under observation X-ray advised.

3. Contusion 2.5 x 1 cm on right hand dorsum on web between right thumb of Index finger, Red in colour.

4. Abrasion 1 x 1/2 cm on left ring finger back lower part.

15. He has further stated that excepting injuries No. 1 and 2 other injuries were simple. These two injuries were kept under observation. Injury No. 1 was caused by sharp edged object and others by blunt object. He further stated that injuries were fresh and could be caused in the same evening at 5 pm. Injury No. 1 was on vital part. He has further proved Supplementary Report prepared on the basis of X-ray plate and X-ray Report and stated that injury No. 1 was found rib deep while injury No. 2 was grievous. He has proved the reports as Ex. Kha. 4 and Ex. Kha. 5. In the cross-examination this witness categorically stated that there was practically no possibility of injury No. 1 being self inflicted or manoeuvred. He also denied the suggestion that injury No. 1 was not on vital part.

16. D.W. 1 Dr. M.M. Lal has stated that he has taken X-ray of Gandhi accused. He proved X-ray plate and X-ray Report which indicated that there was fracture of proximal phalanx of left little finger of accused Gandhi. Other witnesses were produced in support of the plea of alibi of accused Ramesh.

17. On consideration of evidence led from both sides the learned trial Judge came to the conclusion that the prosecution has succeeded in establishing its case beyond reasonable doubt against all the appellants and accordingly the learned Judge has convicted and sentenced the appellants as indicated above.

18. We have heard Sr. G.S. Chaturvedi, Senior Advocate for the appellants, the learned A.G.A. for the State and Sri Sheo Narain Singh for the complainant.

19. As far as factum of death of Kunwarpal deceased on account of stab injuries is concerned learned counsel for the appellants has neither disputed nor assailed the same. This fact is also otherwise fully established from the Post Mortem Report, the statement of Dr. M.N. Ansari and from other piece of evidence brought on record. It also could not be disputed by Sri Chaturvedi that Yashpal P.W. 1 had also sustained injuries in the same incident in which deceased Kunwarpal was

assaulted.

20. Learned counsel for the appellants however argued before us that the prosecution has suppressed true facts from the Court and has presented a distorted version of the incident in as much as the prosecution evidence does not explain the injuries sustained by accused Gandhi in the same incident. He further argued that both Yashpal Singh and Prithivi Pal Singh are interested witnesses and therefore, non-explanation of serious injuries of accused Gandhi will assume much more greater significance. In short his submission is that a reasonable doubt has been created regarding the manner of incident and therefore, the appellants deserve to be acquitted.

21. It is not disputed that the incident had occurred inside liquor shop of accused Ramesh. Dead body of the deceased was found inside the shop. A perusal of the site plan Ex. Ka. 10 would show that liquor shop of the accused Ramesh had its door towards west. It opened on the Pucca road running north-south. In the east there is a verandah running north south. Towards the west of this Verendah there is open space. On the southern side of the shop there was store and in the north of this store there was a sitting place where accused are said to be sitting. As per the prosecution case on account of previous enmity on the day of occurrence at about 5.30 p.m. when the de-ceased Kunwar Pal, Shehtah Singh and Yashpal P.W. 1 were going from Nakur to Asra Kheri and had stopped at the betel shop of Bhoora which was situate in front of liquor shop of accused Ramesh on the other side of the road, all the four appellants came out of liquor shop, caught hold of Kunwar Pal deceased. They dragged him inside liquor shop where Gandhi and Kunwar Pal accused assaulted Kunwarpal deceased with knife and accused Narain Singh and Ramesh caught hold of him. Yashpal was also assaulted by appellant Gandhi when he tried to save Kunwar Pal. As per the defence version the deceased with others entered into the shop of Ramesh chasing Gandhi appellant. Kunwarpal accused was holding a knife while his brother and Brahma had Danda. They started assaulting Gandhi with their respective weapons whereupon Gandhi used knife in self defence. Learned counsel for the appellant submitted before the Court that the entire motive to assault Gandhi was on complainant side as they were the aggrieved persons on account of previous

incident. The prosecution case itself is that on 30-3-79 Kunwar Pal deceased was assaulted by appellants Gandhi, Kunwarpal appellant and their brothers Narendra and Jai Hind as well as Bhushan brother of accused appellant Ramesh. A report of this incident was lodged by Kunwar Pal deceased. A cross report was also lodged by accused Ramesh against Vikram and Kunwar Pal. It was submitted by the appellants' counsel that from the cross-examination of P.W. 1 Yashpal, it is evident that the deceased was a bully as he had been prosecuted in a number of criminal cases including cases under Arms Act and it is the own case of the prosecution that in the prior incident of 30-3-79, Kunwar Pal deceased had been assaulted by the appellants Gandhi and Kunwar Pal, their brothers and brother of accused Ramesh as such he must be having grievance against accused Gandhi and others because he was assaulted by the accused party though he was a bully having past criminal record. He, therefore, had a strong grudge against Gandhi and others. On the day of incident he and his brothers found appellants Gandhi all alone. With a view to take revenge of the earlier incident Kunwar Pal deceased and his brothers tried to attack Gandhi who ran inside the liquor shop of Ramesh appellant with a view to save his life. Deceased Kunwar and others followed him and attacked Gandhi appellant inside the shop of Ramesh. Gandhi accused sustained serious injuries on his person. Injuries included incised wound of 3.75 cm x 1 cm on left side back near inferior angle of scapula. The wound was not probed. It was a bleeding injury. Injury No. 2 was traumatic swelling of 5 cm x 2 cm on left little finger, lower part back. X-ray examination revealed fracture of proximal phalanx of left little finger. This injury was thus grievous in nature. There are two other simple injuries in the form of contusion and abrasion. Injuries of appellant Gandhi were examined on the same day at 7.05 p.m. by Doctor G.S. Gupta, D.W. 2 in government hospital. Dr. Gandhi in his statement before the Court has deposed that the injuries could be caused in the same evening at 5 p.m. Injury No. 2 was grievous and injury No. 1 was on vital part. It was a rib deep injury. D.W. 2 in clear words admitted that there was no possibility of injury No. 1 being self inflicted or manufactured. It may not be out of place to mention here that the medical examination of appellant Gandhi was done in police custody. Learned counsel for the appellants vehemently argued before us that in this case the prosecution evidence, has not explained the injuries of appellant Gandhi and,

therefore, it must be held that the prosecution has suppressed the genesis of the origin of the occurrence and has presented a distorted version. According to him non-explanation of the injuries in the present case has assumed much importance as the prosecution evidence consists in the testimony of interested witnesses. On examination of the record we find force in this submission of the learned counsel for the appellants. Both P.W. 1 Yash Pal and P.W. 2 Prithvi Singh are closely related to the deceased. P.W. 1 Yashpal Singh is the real brother of deceased Kunwar Pal. He is an interested witness because as per the defence version he also participated in the assault made on Gandhi appellant has admitted that he was facing trial as an accused in the cross case. P.W. 2 Prithvi Singh besides being a close relation of the deceased was a chance witness. He has stated that at the time of the occurrence he was present at Nakur Bus Station. His village was removed by about 7 1/2 miles. He stated that as he had been called by his lawyer at Saharanpur he was present at the bus stop. Both these witnesses have stated that no person on complainant's side carried any weapon, nor they caused any injury to accused appellant Gandhi. According to them they had not been any injury on the person of Gandhi appellant. Thus apart from the fact that there is no explanation of the injuries of accused Gandhi in the FIR the eyewitnesses produced from prosecution side in their statements in Court have also not given any explanation of the injuries of appellant Gandhi which were serious in nature and caused in the same occurrence. We have already found above that the incident had occurred inside the liquor shop of accused Ramesh. As per the statement of these two witnesses deceased Kanwar Pal was dragged from a betel shop of Bhoora and was taken inside the liquor shop of Ramesh. No signs of dragging were found at the scene of occurrence by the Investigating Officer when he visited the scene of occurrence. Dr. M.A. Ansari who had conducted autopsy on the dead body of Kunwar Pal had found only two incised wounds. No contusion or abrasion was found on any part of the dead body. Therefore the theory that deceased Kunwar Pal was dragged inside the shop appears to be doubtful. On the other hand the theory looks to be more probable that Gandhi appellant entered into the shop as he was being chased by Kunwar Pal and others and Gandhi appellant was assaulted inside the shop whereby he sustained serious injuries including one grievous injury. These injuries have not been explained from the

prosecution side.

22. The question as to how far prosecution effected on account of non-explanation of the injuries of accused has been a subject matter before the Courts for more than a decade.

23. In the case of Mohar Rai v. State of Bihar, 1969 (6) All Cri C 45 : (AIR 1968 SC 1281), it was held by the Apex Court that failure of the prosecution to offer any explanation regarding the injuries found on the accused shows that the evidence of the prosecution witness is not true or at any rate not wholly true and further those injuries probabllise the plea taken by the accused.

24. In Lakshmi Singh v. State of Bihar, 1976 (13) All Cri C 372 : (AIR 1976 SC 2263) it was held that the non-explanation of injuries on the accused by the prosecution may affect the prosecution case and such non-explanation may assume greater importance when the evidence consists of interested or inimical witnesses or whether the defence gives a version which competes in probability with that of the prosecution.

25. The Apex Court in the case of Onkarnath Singh v. State of U. P. AIR 1974 SC 1550 (1958) laid down that the question as to what is the effect of the non-explanation of the injuries is a question of fact and not of law. Such non-explanation, however, is a factor which is to be taken into account in judging the veracity of the prosecution witnesses and the Court in such cases has to scrutinize their evidence with care and caution.

26. Again in Bhaba Nanda Sharma v. State of Assam, AIR 1977 SC 2252 it was held that before an adverse inference is drawn against the prosecution for its alleged suppression or failure to explain injuries on the person of an accused, it must be reasonably shown that in all probability, injuries were caused to him in the same occurrence or as part of the same transaction in which the victim on the side of the prosecution were injured. The prosecution is not obliged to explain the injuries on the person of an accused in all cases and in all circumstances. This is not the law. It all depends upon the facts and circumstances of each case as to whether the prosecution case becomes reasonably doubtful for its failure to

explain the injuries on the accused.

27. The same question again came up for consideration before a three Judge Bench of the Apex Court in the case of Ram Sunder Yadav v. State of Bihar 1998 (37) All Cri C 519 : (AIR 1998 SC 3117) where the state-merit of law made in Vijayee v. State of U.P. 1990 (27) All Cri C 483 : (1990 All LJ 415) (SC) has been reaffirmed and accepted. The principle that if the evidence is clear, cogent and creditworthy then non-explanation of the injuries of the accused ipso facto cannot be the basis to discredit the entire prosecution case.

28. In a recent decision in Rajendra Singh v. State of Bihar 2000(41) All Cri C 696 : (AIR 2000 SC 1779) it has been laid down by the Apex Court that it is too well settled that ordinarily the prosecution is not obliged to explain each injury on an accused even though the injuries might have been caused in the course of same occurrence but at the same time if the prosecution fails to explain a grievous injury on the accused which is established to have been caused in course of the same occurrence then certainly the Court looks at the prosecution case with little suspicion on the ground that the prosecution has suppressed the true version of the incident.

29. In Kashi Ram v. State of M.P. 2002 (44) All Cri C 57 : (AIR 2001 SC 2902) the members of the prosecution party had assembled near the house of the accused armed with sharp weapons. One of the accused had also sustained number of injuries including two grievous injuries. On the basis of the evidence on record the Apex Court held that injuries of all the three persons who died in the incident on prosecution side were caused when they were in front of the house of the accused Ramesh and in all probability the gun and mouser were fired from or near the house of the accused Ramesh. The prosecution case that the place of incident was situated near the houses of prosecution witnesses was found to be circumstantially belied. Though the plea of self defence was not specifically stated by the accused persons in their statement under Section 313 Cr.P.C., the Apex Court extended the benefit of the right of self defence to the accused persons after taking into account the fact that the incident had occurred near the house of the accused persons and that injuries of accused Prabhu remained unexplained from

the prosecution evidence.

30. Relying upon the aforesaid decision in the case of Takhaji Hiraji v. Thakore Kuber Singh Chaman singh (2001) 6 SCC 145 : (AIR 2001 SC 2328), the Apex Court has stated that the Court ought to make an effort in searching out the truth on the material available on record with a view to find out how much of the prosecution case was proved beyond reasonable doubt and was worthy of being accepted as truthful and the approach of rejecting the prosecution evidence in its entirety for non-explanation of the injuries sustained by the accused persons is erroneous. It cannot be held as a matter of law or invariably a rule that whenever the accused sustained an injury in the same occurrence, the prosecution is obliged to explain the defence injury and on the failure of the prosecution to do so, the prosecution case should be disbelieved. Before non-explanation of the injuries on the person of the accused by the prosecution witnesses may affect the prosecution case, the Court has to be satisfied of the existence of two conditions namely : (1) that the injuries on the person of accused were serious in* nature; and (2) that such injuries must have been caused at the time of the occurrence in question. Non-explanation of the injuries will assume greater significance when the evidence consists of interested and partisan witnesses or where the defence gives a version which competes in probability with that of the prosecution.

31. Keeping the above principles in mind, we have carefully scrutinized the evidence on record of this case. On account of previous incident, the deceased Kunwar Pal was having a strong grudge against the appellant Gandhi and accused Kunwar Pal. From the circumstances appearing in the case the defence plea appears to be more probable that finding appellant Gandhi alone, deceased Kunwar Pal and his companions chased him and when he entered inside the liquor shop of Ramesh accused, he was followed and. assaulted inside the shop. There appears to be no good reason of the presence of Kunwar Pal deceased inside the shop of accused persons. The allegation of the prosecution that he was dragged inside the shop from the other side of the road is neither supported by the medical evidence nor circumstances. Accused Gandhi had sustained serious injuries including one grievous injury and another rib deep incised injury on vital part of the body. In such circumstances accused party certainly had the right of

self defence. In our opinion the prosecution witnesses have deliberately with an oblique motive suppressed the true facts and has not given a correct account of the genesis of the origin of occurrence. In such a situation the Court is left with no option but to extend the benefit of doubt to the accused persons.

32. For the reasons assigned above the appeal is allowed. The Judgment and order of the trial Court convicting and sentencing the appellants are set aside. Appellants are acquitted of the offences charged for. They need not surrender. Their bail bonds are cancelled and sureties discharged.

33. Criminal Revision No. 1325 of 1981 filed by Krishan Lal against Brahm Singh and Yashpal against the order of acquittal recorded in favour of the respondents is dismissed.

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