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Court : Rajasthan

Decided On : Aug-04-1988

Reported in : 1988WLN(UC)116

Judge : Surendra Nath Bhargava and; Shyam Sunder Byas, JJ.

Appeal No. : D.B. Criminal Appeal No. 124 of 1986

Appellant : Basheera and ors.

Respondent : State of Rajasthan

Advocate for Pet/Ap. : Shri. Jagdeep Dhankar

Disposition : Appeal allowed

Judgement :

S.S. Byas, J.

1. Accused Basheera was convicted under Section 302 while accused Noora and Goonga were convicted under Section 302/34 IPC and each was sentenced to imprisonment for life with a fine of Rs. 500/-, in default of the payment of fine to further undergo 6 month's rigorous imprisonment by the Additional Sessions Judge, Kishangarh Bas by his judgment dated February 20, 1986. By the same judgment, accused Basheera was further convicted under Section 3/25 of the Arms Act and sentenced to 6 month's rigorous imprisonment with a fine of Rs.

100/-, in default of the payment of fine to further undergo 1 month's rigorous imprisonment. The accused have filed this joint appeal and challenge their conviction.

2. The prosecution case which is short and simple, may be briefly summarised as under. The 3 accused Basheera, Goonga and Noora who are real brothers inter se and PW 6 Samsu are the residents of village Husainpura Police Stat ion Tapukara District Alwar. The deceased victim Kalu aged about 40 years was also a resident of this village Husaipura. PW 5 Lallu is the resident of village Udaipur. The distance between the two villages Husaipura and Udaipur is nearly 6 miles. The sister of Samsu PW 6 is the wife of PW 5 Lallu.

3. On 15-11-1984 a quarrel took place between the deceased Kalu and the accused persons in their village Husaipura over a place for tethering the cattle. The accused started nursing illwill against the accused. On 16-11-1984 PW 5 Lallu was returning to his village Husaipura from Daruheda. When he reached bus stand Matila, Samsu PW 6 and deceased Kalu met him there. He asked PW 6 his brother-in-law Samsu as to how he happened to come there. Samsu replied that on the preceding day, a quarrel had taken place with the accused persons over the tethering place. The accused had threatened them (him and Kalu) with dire consequences. While these talks were going on, the 3 accused persons also happened to come there. They started abusing Samsu and Kalu. Hearing the noise, Prem Harijan and Kanahiya Ahir also came there and intervened. They requested the accused persons not to quarrel over petty matters. The 3 accused then retreated towards their village Husainpura. PW 5 Lallu took PW 6 Samsu and deceased Kalu to his village Udaipur. In the night they took their meals at the house of Lallu PW 5 then thereafter retired to sleep. Samsu PW 6 and the deceased Kalu slept on separate cots in the Bangla (not the Bungalow). PW 5 Lallu slept nearby in his house. While PW 6 Samsu and the deceased Kalu were sleeping, the accused persons went there to them at about 2 00 a.m. (i.e. in the night between 16-11-1984 and 17-11-1984). Accused Basheera had a gun, accused Goonga had a Ballam and accused Noora had a Lathi PW 6 Samsu got awakened. Accused Goonga placed his Ballam on his chest and threatened to kill him in case he raised cries. Accused Basheera fired his gun at Kalu, as a result of

which Kalu sustained injuries on his chest, waist and other parts. Samsu however raised cries. Accused Basheera fired a shot at him but it did not hit him. Thereafter the accused persons made good their escape. PW 7 Parma, PW 8 Sardar and PW 10 Golu hearing the gun shots came there. They saw the 3 accused fleeing way with weapons. Lallu PW 5 went to police station Tapukara and verbally lodged report Ex. P 13 of the incident at about 7.00 a.m. on 17-11-1984. The police registered a case and proceeded with the investigation. The investigation was conducted by the Dy. S.P. Shri Shukla PW 15.He accompanied with the ASI. Om Prakash PW 13 arrived on the spot and prepared the inquest report Ex. P. 9 of the victim's dead body. The site was inspected and the site plan Ex. P. 2 was prepared. Wad pieces, one lead Ball and 75 lead pellets were found in the woolen jersy which the deceased was wearing. They were seized and sealed. The blood stained Gadda and other articles were also seized and sealed. The post-mortem examination of the victim's dead body was conducted at about 2.40 p.m. on 17-11-1984 by Dr. Mahesh Chand the then Medical Officer Incharge, Government Dispensary Tapukara. He noticed the following injuries on the victim's dead body:

(1) Fire arm wound;

wound to entry--

size:--3.8 c.m. X 2.9 cm. margins of reggion illegible...surrounding is scorched and tattooed. On (Rt.) side of back region at the level of spine of 8th Thoreax Vertebrea and 9 cm. lateral to it.

(2) Fire wound:

Wound of exit--On left side of epigastic region on abdomen;

Size: 2.2 c.m. margins irregular...illegible...No blackening and tattooing of the skin seen. Wound is 5 cm. lateral to the illegible...and 12 cm. above the umblees.

In the opinion of Doctor Mahesh Chand, the cause of death was haemorrhage and shock due to rupture the liver and lunge of right side on account of fired arm injury. The post mortem examination report prepared by him is Ex. P 18. The 3 accused persons were rounded up on 22-11-1984 and in consequence of the information

furnished by them on 27-11-1984, one country made .12 bore SBML gun, lathi and Ballam were recovered. The gun was sent for examination and it was found serviceable.

4. On completion of the investigation, the police submitted a crime report against the 3 accused in the court of the Munsif and Judicial Magistrate, Tizara, who in turn committed the case for trial to the court of Sessions. The learned Additional Sessions Judge, Kishangarh Bas framed the charges under Section 302/34 IPC against accused Goonga and Noora and under Section 302 IPC and 3/25 of the Arms Act against the accused Basheera. The accused pleaded not guilty and faced trial. According to them they have been falsely implicated. The suggestion was made that PW 5 Lallu had and is still having illicit intimacy with the wife of the deceased Kalu. PW 5 Lallu and his brother-in-law PW 6 Samsu had killed Kalu as he was found a hinderance in the way of PW 5 Lallu. In support of its case the prosecution examined 15 witnesses and filed some documents. In defence no witness was examined. On the conclusion of the trial, the learned Sessions Judge found the charges duly proved against the 3 accused persons. They were consequently convicted and sentenced as mentioned at the very out-set. Aggrieved against their conviction, the accused have taken this appeal.

5. We have heard Shri Jagdeep Dhankar, learned Counsel for the appellants and the learned Public Prosecutor Mr. Rizwan Ali. We have also gone through the case file carefully.

6. Before dealing with the contentions of the learned Counsel for the appellants, it would be useful to briefly notice the conclusions and findings recorded by the court below. They are:

[1] The prosecution has utterly failed to prove the motive for the conviction of the murder of Kalu.

[2] The prosecution has again failed to prove the incident alleged to have taken place a day before this incident at bus stand Matila where the appellants had held out threat to kill Kalu.

[3] There was apparent contradiction between the evidence of the ocular witness Samsu PW 6 and the medical evidence. The medical evidence is that wound (1) found on the victim's dead body on the right side of back region at the leavel of spine of 8th thoraxis vertebree was the entry wound and wound (2) found on the left side of chest was the exit wound. PW 6 Samsu in his police statement had stated that the shot fired from gun by accused Basheera hit the victim on the chest and the bullet passed through his back.

[4] The eye witnesses PW 6 and the other witness viz. PW 7 Parma, PW 8 Sardar and PW 12 Golu were the close relatives of PW 5 Kalu. The first was his brother-in-law and the remaining 3 were his first cousins, and

[5] The statement of PW 6 Samsu that he received an injury of Ballam on his chest at the time of the incident is false and unfounded.

7. The learned Sessions Judge despite these infirmities held the evidence of PW 5 Lallu. PW 6 Samsu and PW 12 Golu dependable and trust worthy to hold that Kalu was shot dead by accused Basheera in prosecution of the common object of all the accused.

8. In assailing the conviction of the appellants, it was vehemently contended by Mr. Jagdeep Dhankar that the evidence of the aforesaid witnesses was entirely false and was insufficient to warrant their conviction. When the major part of the prosecution story has been disbelieved by the trial court prudence required that the shooting story should also have been discarded. PW 6 Samsu is a wholly unreliable witness on whom no faith can be pinned.

9. It was on the other hand contended by the learned Public Prosecutor that the conviction of the appellants was proper and justified. The evidence adduced by the prosecution clearly and convincingly point out that Kalu was shot dead by Samsu in prosecution of the common object of all the appellants. We have given out thoughtful consideration to the respective contentions of the learned Counsel for the appellants and the learned Public Prosecutor.

10. Admittedly, PW 6 is the brother-in-law of PW 5. Lallu PW 5 is the son of Sumer. PW 7 Parma, PW 8 Sardar and PW 12 Golu are real brothers inter-se being the sons of Dalel. Sumer and Dalel are real brothers. Thus PW 5 Lallu, PW 7 Parma, PW 8 Sardar and PW 12 Golu are the first cousins. Keeping in view this close relationship of the prosecution witnesses inter-se, their evidence requires cautious and careful approach.

11. The facts of the prosecution case largely loom on the testimony of PW 6 Samsu. He stated that he and Kalu were sleeping on different cots in the Bangla (a kachcha hut with thatched roof) of PW 5 Lallu. At about 2 00 A M. he got awakened on account of some noise. When he opened his eyes he saw the 3 appellants there. Accused Basheera had a gun, goonga had a Ballam and Noora had a Lathi. Accused Goonga placed his Ballam on his chest and threatened to kill him in case he raised the cries. Accused Basheera fired his gun at Kalu which hit him on his chest, waist and other places. The witness further stated that he raised cries and Lallu (PW 5) came running there who was sleeping nearby in the other hut. Accused Basheera fired his gun towards him but the shot did not hit him. The other prosecution witnesses Parma, Golu and Sardar also arrived on the spot hearing the noise and commotion. The appellants left the place and ran away. In his police statement Ex. D. 2 recorded under Section 161 Cr.PC during investigation (portion e to f) he stated: **dkyw ds cUnwd dh xksyh Nkrh ls yxdj dej es ls fudydj [kRe gks x;kA** that is to say shot hit Kalu on his chest. He thus received the entry wound on his chest. The wound on his waist was exit wound. The same fact has been stated in the First Information Report Ex. P 13 where in it has been mentioned that the bullet of the gun hit the victim on the chest and caused exit wound in the waist. Now according to the medical evidence of Dr. Mahesh Chand PW 11 the wound found on the right side of back region was the entry wound and the wound found on the left epigastic region was the exit wound. When PW 16 Samsu was confronted with this portion e to f in Ex. 2, he did not furnish any explanation. Instead of furnishing any explanation he merely denied to have given this statement during investigation. There is thus a major contradiction between the evidence of the ocular witness and that of the Doctor. The evidence is so contradictory that despite best efforts, it cannot be reconciled or harmonised. This contradiction persists and speaks loudly that PW 6 Samsu had not seen the

incident and his claim to have witnessed the incident is false and unfounded.

12. There are some other reasons also to discard in toto the testimony of PW 6 Samsu. He stated that accused Goonga placed the Ballam on his chest and pierced it. Though the blood did not come out but it collected. His medical examination was conducted and he had also shown it to the police. Unfortunately, he stands belied on all there counts. There is no material that his chest injury was noticed by the Investigating Officer or that his medical examination took place at all. He has thus falsely introduced the story of his receiving the injury. If PW 6 Samsu had seen the incident, if he was awakening and if the accused knew that he was awakening, he would not have been spared by the miscreants. They would not have left him alive to depose against them.

13. When the evidence of PW 6 Samsu is properly scanned keeping in view of the surrounding circumstances, we are constrained to say tha the had not seen the incident and he has falsely introduced himself as an ocular witness. It is true that there must be something inherent in the statement of a witness to disentitle him to be believed. Here in the instant case the evidence of PW 6 is replete with such contradictions and improbabilities that his testimony inspires no confidence. His is a tailor-made evidence procured to prove the incident.

14. PW 5 Lallu deposed that at about 2 00 a.m. in the night of the incident he awoke on hearing a gun shot. He got up and ran towards his Bangla. In the way, he was the three accused Basheera, Noora and Goonga emerging from his Bangla. Accused Basheera had a gun, Goonga had a Ballam and Noora had a Lathi. When he made an attempt to catch hold of accused Basheera he fired his gun in the air. At that very time PWs Parma, Sardar and Golu came there. The accused ran away. He and Parma, Sardar and Golu went in the Bangla and found Kalu lying shot dead on a cot. PW 6 Samsu was sitting on a cot and was raising cries. The witness further stated that he left his house at about 7.00 a.m., went to the Police Station, Tapukara and verbally lodged report Ex. P 13 of the incident there. He also narrated the incident alleged to have taken place at bus stand Matila on the preceding day. The trial court has disbelieved him about the quarrel alleged to have taken place with the accused at bus stand Matila. In the First

Information Report Ex. P 13 lodged by him, he stated that the gun shot had hit the victim on his chest. The entry wound was on the chest and the exit wound was on the back. As discussed earlier, this is not borne out from the medical evidence.

15. PW 7 Parma, PW 8 Sardar and PW 12 Golu stated that on hearing the gun shot in the night of the incident they ran towards the Bangia of PW 5 Lallu. They saw the three accused Basheera, Noora and Goonga in the way. Goonga had a gun and Noora had a Lathi. Basheera also had a gun. He fired a shot from his gun in the air. The accused persons thereafter ran away. They went in the Bangia and found Kalu lying dead. Blood was oozing out of his wounds. The learned Sessions Judge accepted the evidence of PW 5 and these three witnesses Parma, Sardar and Golu as true and dependable. It was argued by the learned Counsel for the appellants that all these 4 witnesses are inter-se close relatives. The circumstances point out that what they stated is not true. The contention is not without force. The three PWs Parma, Sardar and Golu saw the appellants from some distance. It was a dark night. It is difficult for a person to correctly identify the running person in a night.

16. There are some striking features which make the entire prosecution version of the appellants' killing Kalu highly suspicious. The accused are residents of village Husainpur and the incident took place in village Udaipur. The distance between these two villages is of nearly six miles. It is difficult to readily believe that the appellants would choose some other place for finishing Kalu where they would be easily resisted The offence of murder is generally committed at a place where the assailants expect the least resistance-keeping in view their own safety. Village Udaipur could not be such a place for the appellants. The deceased Kalu and the accused are close relatives residing in the same village. A petty quarrel over a place for tethering the cattle is not sufficient to provoke or excite the appellants to commit the murder of Kalu. The appellants had also picked up quarrel with PW 6 Samsu in respect of the tethering of the cattle. Samsu should have also been their target, but he remained unhurt. What had happened at bus stand Matila has not been believed and rightly so in our opinion by he Sessions Judge. There was thus no immediate occasion for the appellants to kill Kalu.

17. The gun recovered at the instance of accused Basheera was sent for examination to the State Forensic Science Laboratory, Jaipur and the report received from there is Ex. P 19. When the site was inspected by the Investigating Officer, wad pieces, one lead Ball and 75 lead pellets were found there. They were seized and sealed and were sent for examination to SFSL, Jaipur. Report Ex. P 19 shows that the gun recovered at the instance of accused Basheera was serviceable. The report how ever does not show that the wad pieces, the lead Ball and 75 pellets were fired from this gun. Thus the wad pieces, the lead ball and the pellets have not been connected with the gun recovered at the instance of accused Basheera.

18. There is one more aspect of the matter. When the gun was recovered, one metallic 12-bore cartridge was found in it. Report Ex. P. 19 shows that 75 lead pellets found on the place of incident were different from the pellets contained in the cartridge found in the gun. This again is a major circumstance to be taken into consideration while assessing guilt of the accused.

19. Thus on a close and careful scrutity of the prosecution evidence, the conclusions at which we have arrived, are:

[1] There was no motive for the appellants to finish Kalu for ever;

[2] The incident alleged to have taken place in the day at bus stand Matila does not stand proved. This incident has been concocted to serve as a motive for the appellants to commit the offence;

[3] PW 6 Samsu is totally a false witness and no reliance can be placed on his testimony for any purpose;

[4] The prosecution witnesses PW 5 Lallu, PW 6 Samsu, PW 7 Parma, PW 8 Sardar and PW 12 Golu are close relatives inter-se; and

[5] The appellants cannot be expected to be so fool hardy as to go to some other village to commit the murder of Kalu.

20. For the reasons stated above, we are unable to maintain the conviction of the appellants.

21. In the result, we allow the appeal of accused Basheera, Noora and Goonga. The conviction of accused Basheera under Section 302, IPC and under Section 3/25 of the Arms Act and the conviction of accused Noora and Goonga under Section 302/34 IPC and the sentences awarded to them are set aside. They are acquitted of the offences they were charged with. Accused Noora and Goonga are already on bail. They need not surrender and their bail bonds shall stand cancelled. Accused Basheera is in jail and he shall be immediately set forth at liberty, if not wanted in any other case.

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