

Court No. - 45

A.F.R.

Case :- CRIMINAL APPEAL No. - 879 of 1986

Appellant :- Ram Autar And Others

Respondent :- State of U.P.

Counsel for Appellant :- R.B. Sahai, Rizwan Ali Akhtar, Sadaful
Islam Jafri, S.I. Jafri

Counsel for Respondent :- A.G.A., Ashok Kumar
Singh, D.S.M. Tripathi, Kailash Nath, Manish Shukla, Pratibha
Singh, S.S. Rathore, Triveni Shanker

Hon'ble Manoj Misra, J.

Hon'ble Shamim Ahmed, J.

1. This appeal has been preferred against the judgment and order dated 14.03.1986 passed by the Special Sessions Judge, Jaunpur in Sessions Trial No. 29 of 1982, convicting the appellants Ram Autar, Ram Pal, Panna Lal and Ram Chandra alias Bishun Chand under Sections 302/34 and 323/34 I.P.C. and sentencing them to imprisonment for life under Section 302/34 I.P.C. and one year rigorous imprisonment under Section 323/34 I.P.C. It be noted that the appeal of appellant no.2 (Ram Pal), consequent to his death, was abated vide order dated 30.09.2019.

INTRODUCTORY FACTS

2. The prosecution case in brief, as per the allegations in the written report (FIR) (Ex. Ka-1), lodged by the Babu Nandan (PW-1), brother of the deceased Ram Harakh, is that the the accused Ram Autar alias Bishun Dayal, Ram Pal, Panna Lal and Ram Chandra, who are residents of informant's village, are in litigation with the informant and, therefore, inimically disposed. On account of this enmity, two days prior to the incident i.e. 03.01.1980 informant's brother Ram

Harakh (the deceased) was assaulted with a Gandasi resulting in an injury on his left arm which had to be stitched and of which a case was registered at Jafarabad. After narrating the above background, it is alleged that on 05.01.1980 when Ram Harakh (the deceased) was with his son Banwari @ Gungey and had gone to fetch medicine from Sadar Hospital, Jaunpur, at about 9.30 a.m., near Line Bazar, as soon as they reached in front of the shop of a fodder seller, from a truck (i.e. No. U.S.F.-904), which was loaded with fodder, the accused-appellants and the truck cleaner, who can be recognised if produced, alighted and attacked the deceased and his son (nephew of the informant), with iron rod and *lathi*. As a result of that assault, both of them received injuries. At the spot, informant's brother Raja Ram (P.W.2) and Rajendra (P.W.3), who were returning after selling milk, were present and they witnessed the incident. It is alleged that the deceased and his son were taken to the Sadar Hospital, Jaunpur by Raja Ram where he was declared dead whereas his son (Banwari @ Gungey) was admitted in the hospital after medical examination. The written report, scribed by Ram Adhar (not examined), was registered as an FIR at 11.00 a.m. on 05.01.1980 at Police Station Kotwali, District Jaunpur, giving rise to Case Crime No. 11/1980 of which Chik Report (Ex. Ka-5) and G.D. Entry (Ex. Ka-6) was made by Trilokinath Singh (not examined), whose signatures were proved by PW-6. Inquest was conducted at Sadar Hospital, Jaunpur by about 3.30 p.m. of which inquest report (Ex. Ka-9) was prepared. After completing the investigation, charge-sheet (Ex Ka 14) was submitted against four accused, namely, the appellants herein. After taking cognisance on the charge-sheet, the matter was committed to the court of session. On 13.09.1982, all the four accused i.e. accused appellants were charged with offences punishable under Sections 302 /34 I.P.C. and 323 /34 I.P.C. The accused pleaded not guilty and claimed to be tried.

PROSECUTION EVIDENCE

3. During the course of trial, the prosecution examined six witnesses, their testimony, in brief, is as follows:-

4. **PW-1-** Babu Nandan (the informant). He proved the enmity between the informant and the accused party and claimed that he received information about the incident when he was near Line Bazar crossing. Upon receipt of the information, he had arrived at the spot. He noticed blood on the spot and there, he came to know that people have taken Ram Harakh (the deceased) to the hospital. After receiving the said information, he and Bhaiya Lal (not examined) reached the hospital. At the hospital Buddhoo (not examined), Raja Ram (PW-2) and Rajendra (PW-3) were there. Raja Ram (PW-2) had requested him to lodge the report. He stated that on the information received from Raja Ram he got the report scribed by Ram Adhar (not examined) at the Hospital and, thereafter, he lodged the report. He proved the written report, which was exhibited as Ex. Ka-1. He stated that by the time he reached the hospital, Ram Harakh had died.

In his cross-examination, he stated that his house is about half a *Kos* (equivalent to one mile) towards south of the spot. He stated that on that day he had gone to Husainabad to select a cow. He denied the suggestion that he got the information at his house. He also denied the suggestion that the deceased was not killed by the accused, but they have been falsely implicated. He also denied the suggestion that the First Information Report was lodged on the suggestion of the police and was not dictated in the hospital. In his cross-examination, he admitted that he was employed in Deewani Kutchery but is not working for the last two years.

5. **PW-2 -Raja Ram.** He described the relationship between the accused persons and the informant side by stating that Jai Karan had three sons, namely, Bharosh, Jivbodh and Panchoo. Bharosh had four sons, namely, Babu Nandan (informant), Ram Harakh (the deceased), Raja Ram (PW-2) and Ballabh. Babu Nandan had two sons, namely, Ram Raj and Ram Aadhar. Ram Harakh (the deceased) had three sons, namely, Bajrangi, Radhe and Banwari @ Gungey (the injured). Jivbodh had four sons, namely, Ramnandan, Subhakaran, Shivnath and Kishun. Accused persons, namely, Ram Awtar @ Bishunpal, Ram Pal, Panna Lal and Ram Chandra are sons of Shiv Nath. After describing the spot as a busy place with several shops, in respect of the incident, PW-2 stated that on the date of incident at about 9.30 a.m. while he was returning from Olandganj, after selling milk, along with Rajendra (PW-3), on reaching near Ram Prasad's shop, they noticed a truck parked there. He noticed that Ram Harakh (the deceased) and his son Gungey were travelling from Line Bazar towards T.D. College to go to the hospital for medicine. Then he noticed accused Rampal, Panna Lal, Ram Chandra (PW-3) and Ram Autar, who were sitting in that truck alighting therefrom and assaulting Ram Harakh and Gungey. Along with them, truck cleaner was also there. Ram Pal held an iron rod, whereas rest had *lathi*. Ram Harakh was inflicted blow on the head by Ram Pal with the aid of iron rod, whereas the rest of the accused assaulted Gungey with *lathi*. Upon suggestion by the government counsel, PW-2 clarified that first Ram Pal assaulted Ram Harakh with iron rod, thereafter the rest of the accused persons assaulted him with *lathi*. Gungey was, however, assaulted by Ram Pal, Ram Chandra and Ram Autar with *lathi*. On a specific question as to whether any of the accused were exhorting the other, PW-2 stated that Ram Pal exhorted by saying "finish off the victims". *He stated that at the time when the appellants were assaulting he was at a distance of 10-15 paces from the spot and with*

him there were Rajendra and Buddhoo, who also witnessed the incident. He stated that as they were terrified, they did not intervene. He stated that Ram Harakh, after assault, fell on the northern Patri (pavement) of the road, where blood also fell. He stated that after Ram Harakh fell, the accused escaped. Thereafter, Ram Harakh and Gungey were brought to the hospital by him on rickshaw. The doctor, however, after examining Ram Harakh, declared him dead. Gungey was not only medically examined but also admitted in the hospital. He stated that after about half an hour Babu Nandan (the informant) arrived at the hospital and then he informed Babu Nandan about the incident. In paragraph 9 of his statement he stated that the accused and the informant side were in litigation, both civil and criminal, for last about a year and a half. PW-2 stated that two days before the incident, Ram Harakh was assaulted by Ram Pal, Panna, Ram Chandra and Shivnath, which caused him injury on his left arm and that incident was also reported. He stated that they had won the civil proceedings in court.

In his cross-examination, he stated that he has no knowledge about his brother Ballabh being a witness of the inquest proceeding. He was questioned with regard to the route that he took but nothing much could come out of it, though, he admitted that in between the spot and the hospital, on way, police chowki Olandganj falls. *In paragraph 20 of his statement, during cross-examination, he stated that after half an hour of their arrival at the hospital, Ram Raj arrived at the hospital and by that time, the doctor had already declared Ram Harakh dead and had admitted Gungey in the hospital. In paragraph 21 of his statement, PW-2 stated that when they returned back to the spot from the hospital, then he noticed Ram Prasad, the Fodder seller i.e. shop keeper, washing the spot where blood had scattered. He stated that the blood had scattered on the*

metalled portion of the road, about 7-8 paces north of the shop of Ram Prasad, and not on the Patri.

In respect of the incident, during cross-examination, PW-2 stated that all five accused had assaulted Ram Harakh and Banwari. First Ram Pal attacked Ram Harakh with iron rod and when Ram Harakh fell the rest assaulted him with “danda”. Immediately, thereafter, he stated “गिरने के बाद रामपाल ने रामहरख के ऊपर कोई वार नहीं किया” After that he stated that the accused started assaulting Gungey. He stated that Ram Pal did not inflict any blow on Gungey, but the rest of the accused assaulted Gungey. He, thereafter, reiterated that only four of the five accused had assaulted Banwari @ Gungey. He stated that each of the four accused inflicted one or two lathi blows on Gungey and when 04-06 lathi blows were inflicted upon him, he fell. *In paragraph 25 of his statement during cross-examination he stated that he watched the entire incident from a distance of about 50 paces and several people including shop keepers over there also witnessed the incident and at least 10-5 persons were standing there.* He denied the suggestion that no such incident, as alleged by him, occurred. He also denied the suggestion that the two victims were found injured and upon receipt of information, accused were falsely implicated on account of enmity.

6. **PW-3 Rajendra-** He also stated that while he was returning after selling milk and Raja Ram was with him, near the fodder seller shop, they noticed a truck parked. The accused came from behind the truck, and assaulted Ram Harakh and Gungey while they were on their way. At that time Ram Pal held an iron rod and the rest had lathi. He stated that Ram Harakh was assaulted by Ram Pal with the aid of iron rod, whereas the remaining four accused assaulted Gungey with lathi. He stated that accused were shouting to finish off Ram Harakh and despite intervention, they did not listen. He stated that PW-2 and

he took Ram Harakh and Gungey to the hospital, where Ram Harakh was declared dead.

During cross-examination, he stated that his sister Kamla is married to Hanshraj. Hanshraj and Vanshraj are real brothers. Vanshraj is married to informant's daughter. In paragraph 13 he stated that when he arrived at the spot already 50-60 people had gathered there. They were shop keepers and passersby. He denied the suggestion that the incident did not occur in the manner alleged and that he is telling lies because of his relationship.

7. **PW-4 (Dr. Suresh Chandra Srivastava)** is the doctor, who conducted autopsy. He stated that on 06.01.1980 at about 10.30 a.m. the body of the deceased was received. He conducted the autopsy of the body. According to him death could have occurred a day before and it was possible that it could have occurred on or about 9.30 a.m. on 05.01.1980. He proved the injuries noticed and mentioned by him in the Autopsy Report, which was exhibited as Ex. Ka-2. The injuries noticed by him on the body were stated to be as follows:

- (i) lacerated wound 2.0 cm x 1.0 cm x 0.5cm, 3.0 cm above the left eye brow on the head;
- (ii) abrasion 1.5 cm x 1.5 cm on the left knee;
- (iii) abrasion 0.5 cm x 0.5 cm on right ankle inner side;
- (iv) abrasion 1 cm x 0.5 cm on left scapula
- (v) stitched wound 0.5 cm x 0.5 cm on the outer aspect of left arm

In respect of the internal examination PW-4 noticed-

Head- (i) clotted blood beneath the skin of the head; (ii) fissured fracture measuring 12.0 cm x 0.5 cm on right parietal bone of skull; (iii) fissured fracture on the right frontal bone of the skull measuring 6.0 x 0.5 cm in a diagonal direction with membranes

congested; and on the left side margin of brain there was contusion measuring 4.0 cm x 4.0 cm

Chest- second to sixth ribs on left side and second and third ribs right side from front including sternum were fractured and had punctured the heart.

In paragraph 3 of his statement PW-4 stated that death was due to haemorrhage and injuries on the head and chest. He stated that the ribs might have been fractured on account of the external pressure.

In respect of the injury no. 1, in paragraph 4, he stated that this could be caused by rod or *lathi* and on its own injury no.1 as well as injury on the chest, were sufficient to cause death. He accepted the possibility of death having occurred at 9.30 a.m. on 05.01.1980.

During cross-examination, he specifically stated that the abrasion found on the body could be due to friction against hard object but they could not be a consequence of an impact of *lathi* or rod. *He stated that there was no corresponding external injury to the internal injury noticed on the chest. He stated that in ordinary course, if a lathi blow had been inflicted then external injury would have been noticed. In respect of the injury no.1, he accepted the possibility that it could be a result of collision with a hard object and could also be a result of an accident with a truck. In paragraph 6, he stated that injury nos. 1, 2, 4 and 5 were all on the left side though injury no.3 was on the right side. He stated that the compression injury noticed could also be a result of being crushed by a truck tyre. He also stated that, if a truck tyre goes over the body, the ribs can get fractured. In paragraph 7 he stated that if a truck collides in slow speed and its tyre hits the body then also ribs can get fractured.*

8. **PW-5 Dr. K.N. Yadav.** He stated that on 05.01.1980, while he posted at District Hospital, Jaunpur, at 10.30 a.m., he examined Banwari @ Gungey for his injuries, who was brought by his cousin

brother Ram Raj. He had noticed the following injuries at the time of examination, namely:

i) lacerated wound 6.0 cm x 1.0 cm, skin deep on left side of head, 10.0 cm above left ear, which was bleeding and was kept under observation with advice for X-ray;

(ii) contusion 10.0 cm x 2.0 cm on right side back, 5.0 cm below right scapula (oblique red)

(iii) abrasion 2.0 cm x 1.0 cm on back of left hand, 04 cm below to the wrist. (oozing)

(iv) lacerated wound 3.5 cm x 1cm x skin deep on front and inner aspect of left leg, 7 cm above knee joint, bleeding and paining.

He stated that all injuries, except injury no.1, were simple. Injury no. 1 was kept under observation and X-ray was advised. He stated that all the injuries noticed could have been caused by hard and blunt object, such as *lathi* and were fresh and could have been caused between 9.00 and 9.30 a.m. on 05.01.1980. The injury report prepared by him, noticing the above injuries, was exhibited as Ex. Ka-4.

In his cross-examination, he admitted the possibility of the injuries noticed by him being caused on account of a push from a truck. He accepted the possibility of those injuries being sustained between 5 and 6 a.m. of that day.

9. **PW-6 Hausla Bahadur-Investigating Officer of the case.** He proved the registration of the FIR by Head Moharrir, Triloki Nath Singh as also the G.D. entry thereof. He also proved the various stages of the investigation. He stated that at the spot he did not notice any blood, as that was washed away; and that aspect was therefore specifically mentioned in the Site Plan (Ex. Ka-7), which he prepared

after inspection. He proved the inquest proceedings as also the preparation of *Challan Nash*, *Photo Nash*, letter to the C.M.O. etc., prepared in connection with autopsy. He stated that he had taken custody of the truck in which the accused were allegedly hiding and the custody was given back to its owner of which Custody Memo was prepared, which was exhibited as Ex. Ka-13 on his statement. He proved submission of charge-sheet under his signature, which was exhibited as Ex. Ka-14.

In his cross-examination, he stated that he did not record the statement of Ram Prasad in front of whose shop the incident occurred. He stated that at the spot he could not get a witness of the incident. He stated that he had arrived at the spot with the witnesses as well as the informant at about 11.00 a.m. and when he had arrived Ram Prasad was washing off the blood spot. He stated that the witness Raja Ram (PW-2) did not accompany him to the spot and that PW-6 could not gather any information about the truck cleaner. He stated that he made efforts to ascertain the identity of the truck cleaner but did not get information about him from the truck owner. He stated that he did not notice any blood stains on the truck. He denied the suggestion that an accident from that truck has been given colour of an offence of murder in collusion with the informant and the witnesses.

10. The incriminating circumstances appearing in the prosecution evidence were put to the accused while recording their statements under Section 313 Cr.P.C. They denied their involvement in the crime and claimed that they have been falsely implicated on account of enmity and past litigation. The accused, however, did not examine any witness in defence.

TRIAL COURT FINDINGS

11. The trial Court accepted the ocular account rendered by PW-2 and PW-3 and, upon finding that there existed strong enmity and underlying motive for the crime, convicted the accused-appellants for the offences specified above.

12. We have heard Sri G.S.Chaturvedi, learned Senior Counsel assisted by Sri Anurag Shukla for the surviving appellants; Sri Ashok Kumar Singh, Sri Prem Prakash Yadav and Sri Kailash Nath for the informant; Sri Pankaj Saxena and Sri J. K. Upadhyay, learned A.G.A. for the State; and have perused the record.

SUBMISSIONS ON BEHALF OF THE APPELLANTS

13. Sri Chaturvedi, learned senior counsel, appearing for the surviving appellants, submitted that the autopsy report of the deceased suggests that the injuries were sustained in an accident. In this regard, attention of the court was invited to the autopsy report to highlight that there was no underlying fracture beneath the lacerated wound (injury no.1). Rather, the fissured fracture was on the right side parietal bone of the skull, which means that when the body fell, head banged on the hard surface, or may be compressed by pressure of a tyre going over, the parietal bone got fissured. Had there been a blow on the head with an iron rod as alleged, then the underlying bone would have been fractured but here the fracture is on the other side. He also pointed out that all the injuries except injury no.3 were on the left side whereas the injury no.3 is on right ankle, which is suggestive of the fact that the body collided from the left side and fell on the right side, injuring the knee and banging the head on the floor or hard surface, resulting in fissured fracture on the right parietal bone and when the tyre went over or pressed the body by compression the ribs

got fractured. He submitted that the ocular account does not describe infliction of any such blows, which may result in fracture of the ribs as well as sternum and puncturing of the heart by those fractured ribs. Notably, there is no ocular account of any person sitting over, or pressing, the deceased. Rather, the ocular account is in respect of infliction of blow with an iron road on head by Ram Pal and lathi blows by others but the doctor had specifically stated that if there had been a *lathi* blow, it would have left an external injury mark, which was conspicuous by its absence despite there being an underlying fracture of the ribs and the sternum. This is suggestive of the fact that the internal chest injury was caused on account of compression, either on account of the tyre crushing the body or some heavy weight falling over the body, but as this is not there in the ocular account, and the ocular account does not at all explain these injuries, the ocular account is unworthy of acceptance. He further pointed out that both PW-2 and PW-3 are chance witnesses. The incident took place on the road side, which was a busy road and, admittedly, a large number of people had collected there, as is clear from the statement of PW-3 therefore, it is unbelievable that the accused would assault a person in front of the public. More over, the presence of PW-2 and PW-3 is falsified from the circumstance that the injured Gungey was brought to the hospital not by PW-2 or PW-3, as stated by them, but by Ram Raj, as per the statement of PW-5, which is corroborated by the injury report (Ex. Ka-4). It has been submitted that admittedly the informant's side and the accused side were embroiled in litigation, both civil and criminal, they had thus strong reason to falsely implicate and, therefore, it appears to be a case where an accident has been taken as an opportunity to settle a score by falsely implicating the accused-appellants.

14. Sri Chaturvedi also submitted that in so far as the charge of an offence punishable under Section 302 read with 34 I.P.C. is

concerned, that is not made out against the surviving appellants Ram Autar, Panna Lal and Ram Chandra alias Bishun Chand, inasmuch as, the allegation in the ocular account is of infliction of iron rod blow on the head of the deceased by Ram Pal (the appellant, who died during the pendency of appeal) whereas there is no specific allegation that the deceased was assaulted by the surviving accused-appellants. Even assuming that at one place infliction of *lathi* blows on the deceased is alleged but no corresponding external injury has been noticed. The abrasions noticed by the autopsy doctor, from the testimony of PW-4, are ruled out to be an outcome of *lathi* blows. It has thus been submitted that the appellants 1, 3 and 4 have not caused any injury to the deceased hence their conviction under Section 302 I.P.C. with the aid of Section 34 I.P.C. is not at all justified.

15. Lastly, it was contended that it is a case where no independent witness has been examined, despite the fact that it was a road side occurrence, in front of a shop and the shop keeper Ram Prasad was very much available, but, even during the course of investigation, his statement was not recorded by the Investigating Officer therefore the prosecution has suppressed best evidence, as a result whereof, an adverse inference be drawn against the prosecution. In this regard it was submitted that even though Banwari @ Gungey might be dumb and deaf but he could have been examined with the aid of sign language interpreter as is permissible under Section 119 of the Evidence Act and, therefore, non-examination of Gungey is also a reason to draw an adverse inference against the prosecution.

SUBMISSIONS ON BEHALF OF THE STATE AND OPPOSITE PARTIES

16. Per contra, the learned counsel for the State as well as the informant submitted that this is a case where a prompt FIR was lodged. It is a day light occurrence. There is no suggestion to the eye-witnesses to dispute the spot and, therefore, washing off the blood spot, would not make a difference. Assuming that the witnesses were

interested, it is not the law that an interested witness testimony cannot be accepted, particularly, when it is corroborated by medical evidence on material aspects. It has been submitted that the injury sustained by Banwari @ Gungey appeared to be on account of an assault on him by lathis and those injuries cannot be a result of an accident. Further, it cannot be a mere coincidence that the deceased as well as the injured suffered injuries on or about the same time and, therefore, it can be assumed that the incident occurred in the manner alleged. Non-examination of the independent witnesses and non-examination of a deaf and dumb injured witness would not be fatal to the prosecution case in the given facts of the case. It has also been submitted that the medical opinion expresses only a possibility, but where the ocular account is clear and cogent, unless it is totally ruled out by the medical opinion, the ocular account is to be accepted and cannot be rejected only because the possibility of injury occurring in some other manner than suggested by the ocular account is there. It has been submitted that since the ocular account is largely corroborated and not ruled out by the medical evidence and there is a prompt First Information Report, the conviction recorded by the trial court does not call for interference.

17. In respect of the surviving accused-appellants not sharing common intention with Ram Pal, learned A.G.A. submitted that *lathi* blows are alleged to have been inflicted upon the deceased by other remaining accused, therefore, it can be accepted that all had participated with common intention to finish off the deceased.

ANALYSIS

18. Having considered the rival submissions and having noticed the prosecution evidence, before we proceed to test the testimony of the eyewitnesses PW-2 and PW-3, we may put on record that it is clear from the evidence brought on record that the informant's side and the accused side were inimical to each other and were embroiled in

litigation, both civil and criminal, for long. PW-2 is the brother of the deceased as well as of the informant and PW-3 is also related to the victim family as could be noticed from his testimony. It is, therefore, a case where the ocular account is flowing from interested witnesses. We notice from paragraph 7 of PW-1's deposition that he had worked in the Kutchery. In these circumstances, it is probable that he would be aware of the nuances of litigation and might not like to miss an opportunity to out manoeuvre the other side. In **Lakshman Prasad V. State of Bihar, 1981 (Supp) SCC 22**, in paragraph 3, the Supreme Court had observed that *mere congruity and consistency are not the sole test of truth*. It was observed that *sometimes even falsehood is given an adroit appearance of truth, so that truth disappears and falsehood comes on the surface*. Thus, keeping in mind that the prosecution version is flowing from highly inimical and interested witnesses, we would have to be circumspect in accepting the ocular account without putting it to stringent tests.

19. What we notice here is that the ocular account not only flows from interested witnesses but the two witnesses who have stood up to support the prosecution case are chance witnesses. Notably, the informant (PW-1) is not the eye witness of the incident. PW-2 and PW-3, the alleged eyewitnesses, according to them, had gone to sell milk and were returning after having sold the milk, when, on way return, they witnessed the incident on a busy public street with shops around. According to their ocular account, they witnessed the incident from a short distance across the road. They also stated that there were several persons in the area, when they arrived. Yet, they do not make an attempt to save the victim or to intervene even though it is not the prosecution case that the accused were armed with deadly weapons such as cutting instruments or firearms. From PW-3's testimony it appears 50-60 people had collected there when he arrived. With 50-60 men around and there being just four or five

assailants with hard blunt objects, easily people could have intervened and stopped the occurrence. But, here, there is no statement of any of the witnesses in respect of any effort in that regard. In a night occurrence, on a secluded street, non interference by bystanders may not raise a doubt. But here the incident is in broad day light on a busy street and in the presence of shop keepers as well as passersby yet, there is no effort to intervene. This raises a serious doubt with regard to the presence of PW-2 and PW-3 on the spot as also with regard to the incident occurring in the manner alleged.

20. Our doubt noticed above gets amplified from the following circumstance - PW-2 states that Gungey was taken to hospital by him whereas, Ram Raj (not examined) arrived at the hospital about fifteen minutes to half an hour later, after Gungey had been admitted in the hospital. But, when we see the record (Ex. Ka-4) and notice the statement of PW-5, we find that Gungey was brought to the hospital by Ram Raj (i.e. son of the informant who has not been examined). PW-1 says that he rushed to the spot on receiving information. But how and from whom he got information PW-1 does not disclose. This clearly suggests that informant got the information ahead of PW-2 and PW-3 about the incident and, on receipt of information, the informant rushed to the spot and his son Ram Raj took the injured to the hospital and admitted him there. Notably, Ram Raj has not been examined by the prosecution. Had Ram Raj been examined, he could have cleared our doubts as to in what circumstances could he accompany the injured to the hospital. Name of Ram Raj in medical paper, on its own, might not be of significance as, out of many present there, the doctor while admitting the patient may record the name of any one of them in the admission register. But, here, PW-2 states that Ram Raj arrived 15 minutes to half an hour after Gungey was admitted. This circumstance definitely dents the credibility of PW-2's deposition that he was present at the spot and had rushed the injured and the deceased

to the hospital. As PW-2 and PW-3 were allegedly together, credibility of PW-3's statement gets equally dented more so, because, during cross-examination, he stated that when he reached the spot already 50-60 persons had gathered, which suggests that the incident had already occurred.

21. Another aspect of the case is that the shop keeper Ram Prasad, in front of whose shop the incident occurred, has not been examined. Another striking feature of the case is that the Investigating Officer (PW-6) noticed the shop keeper washing off the blood stains from in front of his shop, but he took no steps to stop that and to collect the blood to confirm the spot. When we notice the site plan (Ex. Ka-7), spot A is the place where the deceased was assaulted and where the blood was washed off by Ram Prasad. Noticeably, spot A is located across the road/ street, if one views it from the shop of Ram Prasad. No doubt, the Truck is allegedly shown parked in front of the shop of Ram Prasad at point X but since spot A is across the road, why would Ram Prasad wash off the blood-stain there. All of this creates a serious doubt with regard to the spot where the deceased was allegedly assaulted, that is, whether it was on *Patri* of the road or in the middle of the road. Notably, the Investigating Officer did not record the statement of Ram Prasad to verify whether the allegations made before him were truthful. Another important feature in this regard is that as per the Site Plan (Ex. Ka-7) the blood was washed off from the *Patri* whereas in the testimony of PW-2 it has come that the blood was not on the *Patri* but on the metalled surface of the road 7-8 paces in front of the shop of Ram Prasad. All of this raises a strong suspicion that the incident occurred in the middle of the road and might be a case of a road accident which has been deftly given the colour of a heinous crime. In ordinary circumstances such a doubt may not arise but here the parties had been litigating with each other for few years and, therefore, well versed with nuances of law and

well equipped to grab an opportunity of the kind offered by the incident to out manoeuvre their opponent.

22. When we notice the autopsy report, we find that there is no underlying fracture to the injury no.1. The fissured fracture noticed by the autopsy surgeon is on the right side parietal bone of the skull and on the right side of the frontal bone of the skull, whereas the lacerated wound is found on the left side which suggests that the fracture was caused not on account of infliction of iron rod blow, but on account of falling on the hard surface, after being hit on the left side of the head. Another important aspect noticeable in the autopsy report as well as in the testimony of the autopsy surgeon (PW-4) is that fracture of the ribs and sternum had no corresponding external injury. A specific suggestion was put to the doctor in respect of such injury being caused by a *lathi* blow to which he responded by saying that if it had been so, it would have left an external injury mark. PW-4, rather, accepted the possibility of that kind of injury as a consequence of compression. But the ocular account of PW-2 and PW-3 details no such circumstance on the basis of which we may be in a position to infer that, that kind of compression was a result of any specified overt act of the accused. Notably, it is not the case of the prosecution that the accused were kicking the deceased or were sitting over him, or pressing him. It is a simple narration of assault by rod and lathi. In fact, at one place, the witness stated that there was solitary assault by iron rod on the head though, later, it was added that lathi blows were also inflicted. But at no stage there is an allegation of pressing the deceased or kicking him or beating him with fists or of sitting over him. In these circumstances, the fracture of right parietal and frontal bone of the skull, sternum and ribs of the deceased, as a result of compression, find no explanation in the ocular account thereby making our suspicion stronger that those injuries were a consequence of an accident. Admittedly, there was a truck parked on the spot. The

ownership of that truck has not come out in the prosecution evidence, though it has come in the statement of the Investigating Officer that that truck was seized and custody of that truck was passed on to its owner. This means that there was an involvement of a truck. PW-2 states that the accused were sitting on the truck and they alighted from that truck to launch an assault. PW-3 states that the accused came out from behind the truck. Both state that the truck was parked in front of the shop of Ram Prasad. Ram Prasad has not been examined. The cleaner, who also allegedly participated, has not been identified. Notably, it is not the prosecution case that the accused were lying in ambush to launch an assault on the victims as that spot was frequently visited by the victims at a specified time. For all the reasons detailed above, we do not find conviction in the prosecution story and the testimony of the eyewitnesses does not inspire our confidence. There appears a cloak of suspicion shrouding the prosecution case giving us a strong feeling that the informant party has grabbed the opportunity of an occurrence, perhaps an accident, to spin a story against its rivals. More so, because both PW-4 and PW-5 i.e. the doctors have accepted that the nature of injuries found on the deceased as well as the injured Gungey could be a result of an accident. Our doubts could have been dispelled by independent witnesses had they been examined by the prosecution, particularly because the incident occurred on a busy public street and in the presence of 50 odd bystanders including shop keepers who had their shops there, but, unfortunately, the shop keeper who allegedly washed off the blood from the spot was not even interrogated. Not only that, even the spot of occurrence could not be confirmed by lifting of blood-stained earth therefrom. Once that is the position, and the prosecution case flows from highly interested witnesses, who are witnesses by chance, and their presence at the spot is not confirmed by medical paper of the injured, which shows that the

injured was brought by some other person to the hospital, we have no hesitation to extend the benefit of doubt to the accused-appellants.

23. As we have already doubted the ocular account of PW-2 and PW-3, we do not propose to examine the alternative argument on behalf of the surviving appellants that in the facts of the case they could not have been fastened liability for the charge of murder with the aid of section 34 IPC.

24. For the reasons above, the appeal is **allowed**. The judgment and order of conviction and sentence recorded by the trial court qua the surviving appellants, namely, appellants 1 (Ram Autar), 3 (Panna Lal) and 4 (Ram Chandra @ Bishun Chand, is set aside. The surviving appellants are acquitted of the charges for which they have been tried and convicted. They were on bail therefore, they need not surrender subject to compliance of the provisions of section 437A CrPC to the satisfaction of the trial court below. However, we notice that on 10.03.2022 non-bailable warrants were issued to the surviving appellants as none had appeared to press the appeal on their behalf. In that scenario, we direct that if, non-bailable warrants have not yet been executed, they shall not be executed and treated as cancelled, but if they have already been executed, the surviving appellants shall be released forthwith, subject to compliance of the provisions of Section 437-A Cr.P.C. to the satisfaction of the trial court.

25. Let a certified copy of this order along with the record be sent to the trial court for information and compliance.

Order Date :-19.04.2022

Arvind