

A.F.R

Reserved on : 08.04.2022

Delivered on : 07.07.2022.

Case :- GOVERNMENT APPEAL No. - 1709 of 1984

Appellant :- State of U.P.

Respondent :- Baij Nath And Others

Counsel for Appellant :- Dga

Counsel for Respondent :- V.C.Katiyar,Dhirendra Kumar
Srivastav,Pushpa Varma,V.Singh,Virendra Singh

Hon'ble Om Prakash-VII, J.

Hon'ble Umesh Chandra Sharma, J.

(Delivered by Hon'ble Umesh Chandra Sharma, J.)

1. At the outset, it is clarified that accused-respondent no. 2 – Saggal and respondent no. 3 Bhaggu have died during the pendency of the appeal, thus the appeal filed against them have been abated *vide* order dated 08.04.2022, henceforth the Court is proceeding to decide the appeal against surviving respondent.
2. Heard Shri Ratan Singh, learned A.G.A. for the State, Shri Virendra Singh, learned counsel for the accused-respondent and gone through the entire court record with the assistance of the respective counsels.
3. The instant appeal has been filed against the judgment and order dated 02.03.1984 passed by Assistant Sessions Judge, Mirzapur, in Sessions Trial No. 156 of 1982 arising out of Case Crime No. 227 of 1981, under Section 307 I.P.C., whereby, the deceased accused persons Bhaggu and Saggal and alive accused-respondent have been acquitted.

4. In brief the State of U.P. has pleaded in appeal that judgment and order of acquittal is wholly illegal and erroneous and against the law. Learned Trial Court has not assessed the prosecution evidence appropriately and has not considered the facts and circumstances of the case and material on record. The alleged offence took place on 02.11.1981 at 07:30 P.M. and the F.I.R. was lodged on the same night at 10:00 A.M. Blood was recovered from the Ekka and pieces of bomb and splinter etc. were also recovered. The prosecution has examined the following 08 witnesses, to prove the prosecution version:- (i) P.W.-1, Paggal, informant witness (ii) P.W.-2, Gulab, informant (iii) P.W.-3, Dr. A. D. Singh (iv) P.W.-4, Dr. K.N. Srivastava, (v) P.W.-5, Dr. C.P. Singh (vi) P.W.-6, S.I. Sarju Prasad Chaudhari, I.O. (vii) P.W.-7, Girija Shanker Tripathi, Head Constable and (viii) P.W.-8, Kunwar Bind Narayan, Pharmacist. There was no occasion to acquit the accused persons, therefore, the impugned judgment and order be set aside and the appeal be allowed and the accused-respondent, Baijnath be convicted and sentenced in accordance with law.

5. In brief facts of the case are that complainant- Gulab moved an application on 02.11.1981 to lodge the F.I.R. with the allegation that his brother Paggal used to drive Ikka and he was going on Ikka with his brother from Mirzapur city to his house; Amarnath Nai was also sitting on the said Ikka: At about 07:30 P.M., when all the three persons sitting on the Ikka reached at Railway crossing on Aam Ghat, three accused persons suddenly came and threw bombs on his brother Paggal. Miscreants were seen and recognized in the head light of truck. Upon hearing the noise of explosion of bomb, witnesses Figgal S/o unknown and so many other persons reached on the spot. Accused persons escaped. Paggal was seriously injured as well as Amarnath Nai has also received injuries. Few parts of Ikka were broken. There were inimical terms between the Paggal and accused persons due to some criminal cases as a result of which the accused persons inflicted bomb injuries with intention to kill him. The

informant admitted the victim in the hospital and went to police station to lodge the F.I.R. One Jai Prakash has scribed the F.I.R. This information (*Tahrir*) has been exhibited as Exhibit Ka-I.

6. Informant Paggal was medically examined on the same day at 09:00 P.M. in District Hospital Mirzapur where the Doctor found 08 injuries; out of which 06 were lacerated and 02 were abrasion on the body of the victim. A radiological report was also prepared which is exhibited as Exhibit Ka-3, proved by Dr. K.N. Srivastava whereas the injury report of the injured Paggal has been proved by Dr. C.P. Singh as Ex. Ka-2, who opined that all injuries have incurred by the bombastic attack. He deposed that it appears that the attack was done from the front side.

7. Since the injuries nos.1 & 2 were serious in nature, therefore, X-ray was advised by the Doctor. P.W.-4, Dr. K.N. Srivastava, Radiologist found in X-ray that libera and fibula bones of the right leg of Paggal were broken in several parts on the lower part. About 2nd injury; report was NAD and no foreign body shadow was seen. P.W.-4 was of the opinion that X-ray done by him is trustworthy. P.W 5, Dr. C.P. Singh examined another injured Amarnath Nai on 03.11.1981 at 12 'o' clock and found contusion (scabbed) 0.5x0.5 cm on the middle of internal side of his right leg and 2.0x2.0 cm abrasion (scabbed) on the front of left leg below 0.8 cm from the left knee. The third injury (scabbed) abrasion 2.5x0.5 c.m was on the outer part of left wrist. According to the Doctor, these injuries were not caused by the explosive substance or fire-arm, but were caused by blunt object and rubbing and were ½ day old. It is noteworthy that during the trial the injured witness Amarnath Nai has not been examined.

8. P.W.-6, Sarju Prasad Chaudhari, S.H.O started the investigation on the same day i.e. on 03.11.1981 and reached the place of occurence and recorded the statement of informant Gulab and injured Paggal, searched

the accused person and collected the parts of bombs, sutali, kathari and Ikka and blood stained wooden part of Ikka and prepared the recovery memo which is exhibited as Exhibit Ka-5. He has also proved the recovery memo as exhibit Ka-7. He has also prepared the site map and proved as Exhibit Ka-8 in the Court. He also sent another injured Amarnath Nai for treatment through a Constable after recording of his statement. He arrested accused Baiznath and recorded his statement. On 04.11.1981 after surrender, recorded the statement of the other accused persons namely, Saggal and Kallu and submitted the charge-sheet which is exhibited as Exhibit Ka-9, after completing the investigation.

9. Case being exclusively triable by the Sessions Court was committed to the Court of Sessions. Accused appeared. Charge for the offence u/s 307/34 I.P.C. was framed against them. To which they denied and claimed their trial.

10. Prosecution in support of its case examined eight witnesses in total as disclosed hereinabove.

11. The following documentary evidence have also been produced by the prosecution to prove its case.

(1) Exhibit ka-01, written statement by the complainant PW 1 Gulab

(2) Exhibit Ka-02, injury report of injured Paggal

(3) Exhibit Ka-03, radiology report of injured Paggal

(4) Exhibit Ka-04, injury report of Amaranth Nai

(5) Exhibit Ka-05, recovery memo of blood stained wooden parts of Ikka

(6) Exhibit Ka-06, recovery memo of blood stained 'Kathari'

- (7) Exhibit Ka-07, recovery memo regarding Sutali Bomb
- (8) Exhibit Ka-08, recovery memo of site plan prepared by the investigation officer
- (9) Exhibit Ka-09, charge sheet
- (10) Exhibit Ka-10, copy of chik FIR
- (11) Exhibit Ka-11, carbon copy of GD regarding lodging of FIR
- (12) Exhibit Ka-12, GD regarding arrest of accused Baijnath
- (13) Exhibit Ka-13, bed head ticket
- (14) Exhibit Ka-14, outdoor ticket.

The burden of proof lies on the parties, who substantially asserts the affirmative of the issue and not upon the party, who denies it. In criminal cases it is for the prosecution to bring the guilt home to the accused. The accused is not bound to establish his innocence for the reason that there is no burden laid on the accused to prove his innocence and it is sufficient if he succeeds in raising a doubt as to his guilt.

In the case of *Bishan Dass Vs. State of Punjab A.I.R 1975 Supreme Court 573*, the Supreme Court held that even total silence of the accused as to any defense of his part does not lighten the prosecution burden to prove it's case satisfactorily.

In the case of *Kali Ram Vs. State of H.P, A.I.R 1973 Supreme Court 2773*, the Supreme Court held that in a criminal trial the onus is upon the prosecution to prove the different ingredients of the offence and unless it is discharge that onus it can not succeed.

In the case of *Pratap Vs. State of U.P. AIR 1976 Supreme Court 966*, the Supreme Court held that the burden on the accused is not onerous as that which lies on the prosecution. While the prosecution is required to

prove this case beyond reasonable doubt, the accused can discharge his onus by establishing a mere preponderance of probability.

A case is a “proceedings” within the meaning of Section 102 Evident Act and the burden of proof in such a proceeding lies on the prosecution for the simple reason that if neither the prosecution nor the defense leads evidence, the accused is entitled to be acquitted.

In the light of above principles of law, the oral and documentary evidence adduced by the prosecution shall be analyzed.

12. P.W. 1 Paggal injured (brother of the informant P.W. 2 Gulab), has deposed as injured eyewitness and he has stated that when Ikka reached near the turning point after crossing the railway crossing, accused Saggal Bhaggu and Baij Nath, who were hiding there, started bombing. Baijnath fired the first bomb on him which hit the wheel of Ikka. Bhagu detonated the second bomb, which fell on the ground and exploded. Third bomb was detonated by Suggal which fell on the bamboo of the ace, it hurt his leg, hand and ear. Horse and Amarnath also got injuries, the horse-ran by its sound and stopped before the Aamghat river. He admits that Saggal & Bhaggan are the real brother, Baijnath is a mechanic.

13. According to this witness four months before this incident, he was thatching shanty when Saggal, Bhaggan, Jogi and Chhote Lal (deceased) came and started hitting him and did not allow the shanty to be kept, Chhotel Lal got hurt by sticks of them, but they suspected him for his injury who succumbed to death on next day. Since then they bore enmity with him and started looking for him to kill. He admits that Baijnath is the resident of another village and there is no kinship among them. He admitted that he has been convicted for the murder of Chhotey Lal despite being innocent. He admits that in the night of the incident, it was dark and he started journey from Peeli Khoti at about 6:30 to 6:45 p.m. He also admits that the spot is not deserted place, there are houses of several

persons adjacent to it and there is an adjacent railway gate where one or two men remain present always on duty, there is also a betel shop near the railway gate. According to this witness that time accused was going from west to east. The gate was closed, so they had stood up north, when the gate opened, they went towards the south. Accused were in some speed, which he could not see. Again, he deposed that he did not see where the killers were hiding, when his face was towards east, suddenly a bomb fell on him and he exhorted the accused. The bomb was thrown at him from the southern track of the road. He was stunned when the first bomb hit him. He could not run away after jumping. Rather the horse-ran fast after hearing the sound of the bomb. Then two bomb fell on him. He shouted, by then the accused had reached the bridge of Amghat. The truck was parked on the bridge of Aamghat, so the accused stopped. There was a lot of smoke when the bomb exploded. The killer fled away to the west. He did not have a torch. Amarnath did not even have a torch. The killer did not wear a bounty on their faces, they did not try to hide themselves. No one followed the killer. There was a huge crowd of people around, they did not have any conversation with them. In such a situation it can not be concluded that the witness had recognised the accused persons.

14. According to the opinion of this Court, if the victim had actually recognised the accused he would have told the people of the crowd that such people had attacked upon him. Further he admits that he did not tell the doctor as to who fired the bomb upon him. He again could not tell as to whether he got bombed first or Amarnath. In such as a fact, how it is possible that he would have recognised the accused persons. The statement of the people residing in the nearby houses or the government servants doing duty at the railway gate were not recorded nor they were examined in the court. This witness admits that he did not see the place where the accused were hiding. He admits that the dense smoke was near by at the scene. The witness does not say that before committing the

incident he had seen the accused person at the spot. He admits that it was a dark night and there was no light at the scene and that he or Amanath did not have a torch. It is the contention of the prosecution that the witnesses recognized the accused persons in the light of the truck. But according to this witness the truck was not standing on the spot but the truck was standing on the Aamghat bridge. In such a situation it would not be possible to identify the accused in the light of the truck. If the P.W. 1 was plying the Ace, he would be looking at the road ahead and not side by side. According to this witness, when the bomb fell, the horse-ran very fast and reached to the Aamghat bridge, in such a situation there was no opportunity to see the accused persons by any of the witness. According to this witness the face of the accused persons were open and they did not try to hide their identity, but it is contrary to human nature that if the injured and the witnesses are familiar to the accused persons, they will keep their faces hidden. If the testimony of the witness is true then in such a situation, it can be thought that the accused had no fear, if so why did they choose the night time for attack, they could have openly committed such an incident, even during the day time.

15. P.W. 1 in his cross examination at Page 6 admits that in his area if the killer is not seen, then any one can be implicated, that is why he was implicated for the murder of Chhotey Lal. In the opinion of court as to why the same principle can not be applied in this case. He deposed that his face was towards the east and the accused persons attacked from the west and fled away towards the west. In such a case there will be no opportunity to identify the accused persons by the witnesses. He could not tell the name of truck driver or truck number in the light of which he had identified the accused persons and the I.O. has not shown and found any such truck and source of light. This leads to the conclusion that there was no truck head light in which he has recognised the accused persons. Thus the finding of this court is that the evidence of this witness is not credible

and acceptable and without recognising the accused persons they were implicated on the basis of enmity.

In the case of *Shyam Sunder Vs. State of Chattisgarh, AIR 2002 S.C 2815*, Apex Court held that where it is found that the relationship between the prosecution witness and his family members on the one hand and the deceased and his family members on the other hand were strained and a criminal litigation was also pending between them, the testimony of the witness needs to be subjected to careful scrutiny.

In case of *Ramnand Yadav Vs. Prabhu Nath Jhan & Ors AIR 2004 SC 1053*, the Supreme Court held that if the relatives or interested witnesses are examined, the Court has a duty to analyse the evidence with deeper scrutiny and then come to a conclusion as to whether it has ring of truth or there is a reason for holding that the evidence was biased. Whenever a plea is taken that the witness is already partisan or has any hostility towards the accused, foundation for the same has to be laid. If the material shows that there is a partisan approach, the Court has to analyse the evidence with care and cation.

16. P.W – 2, Gulab is the real brother of injured P.W. 1, who is said to be present with Amarnath on the Ace at the time of the incident, exact and word to word similar deposition by the witnesses about the manner of attack leads to the inference that the witnesses are tutored, because every witness shall see the occurrence from their own angle. In this case there is no source of light and incident took place in a dark night, in spite of that witnesses have also deposed about the manner of attack by the accused persons with utmost similarity in their examination-in-chief.

17. Contrary to P.W. 1, this witness says that the night was the moonlight. This witness also admits heavy smoke on the spot. Contrary to P.W- 1 this witness says that attackers ran to the side of south. This witness says that their faces were towards the east and when the Ace went

to the east accused persons threw the bombs. In the above situation there would be least possibility of recognising the accused persons. This witness also did not contacted the truck driver. According to him crowd of about 25 persons put off them from the Ace but no conversation took place with them. This also leads and creates doubt that if P.W 1 and P.W-2 had recognised the accused persons why in natural way they shall not speak about the accused persons and shall not share their names with the people of crowd. This witness also admits previous enmity with the accused persons which may be a reason for false implication or may be reason of committing the offence also as the enmity is the double edged weapon.

18. Both the witnesses of fact are real brother and interrelated and inimical witnesses. About the injured witness, there is presumption that he was present on the spot but there is no presumption that he is deposing the true facts. An independent witness Amarnath Nai did not come forward to support the prosecution case, which leads inference that he was not ready to tell a lie in support of the prosecution case. P.W.- 3, P.W-4 & PW-5 are doctors, who examined the injured persons but from their report and oral evidence, it is not proved that the injuries were caused by the accused persons as they are the formal witnesses .

19. In cross-examination, P.W-6 deposed that Railway gate is situated towards the north-west of the place of occurrence. He admitted that railway personnel do their job there 24 hours but he has not recorded the statement of any employee of the Railway Department. He has also recorded the statement of nearby residents such as Jaggu, Mangaru and Seva. He admits that he had not recorded the statement of Doctor. He admits that since there was no source of light on the spot, therefore he did not mention and showed it in the map. He visited the spot in the night and found it darky and cloudy.

20. P.W.-7, HCP Giriza Shanker Tripathi had prepared chik F.I.R. which is exhibited as Ex. Ka-10. On the basis of written *Tehrir* of the informant Exhibit Ka-1 and carbon copy of GD regarding registering the case as Exhibit Ka-11 and GD regarding the arrest of the accused Baiznath as Exhibit Ka-12 were prepared. He has proved these documents from his evidence on oath.

21. P.W.-8, Kunwar Bind Narayan, Pharmacist has adduced secondary evidence about the acts and report of Doctor A. D. Singh. He proved the Bed Head Ticket as Exhibit Ka-13 and out door slip as Exhibit Ka-14 prepared by Dr. A. D. Singh to be prepared by him in his hand-writing and signature.

22. After closure of oral evidence, statement of accused persons were recorded under section 313 IPC. Accused Baij Nath has stated that pagal is his relative and had taken loan from him and to avoid repayment Paggal has falsely implicated him. Paggal and Gulab are real brothers. Bhaggu has stated that due to enmity, he has been falsely implicated as accused. Due to enmity Gulab and Paggal, have adduced the evidence against him. Similar explanation has been given by the accused Saggal. Both these two persons have not given any details of enmity. The co-accused Baijnath has also not given any particulars regarding the loan from the accused persons and they have not produced any oral or documentary evidence in defence.

23. The Trial Court has not believed the testimony of P.W.-1 on the ground that at the time of occurrence there was dark smoky night and the witnesses were not able to see the place where the accused persons were hidden.

On the above discussion, this Court is of the considered view that there is some variations on the point that as to whether at the night of the occurrence there was dark or of full moon light. It is proved that it was a

dark and cloudy night and there was no light of truck to recognize the accused persons. The accused persons have falsely been implicated in this case on the basis of previous enmity and no explosive substance, ammunition or bombs have been recovered from their possession upon their pointing out. The I.O. of the case has neither satisfactorily investigated the case nor recorded the statements of the railway employees deputed on Railway Gate. He has not recorded the statement of the Doctor and he has not found any source of light on the spot. He has not shown any truck or truck light in the map prepared by him and according to him it was a cloudy night, he has not shown any place of hiding of the accused persons or any drum alleged by the witnesses of fact. The independent witness Amar Nath has not been examined by the prosecution. This incident might have been caused by some other persons for the purposes of robbery etc.

From the above discussions, it is clearly established that the witnesses have not been able to recognize the accused persons and the accused persons were named in F.I.R on account of enmity. Thus, it is a case based on circumstantial evidence, in which chain of circumstances must be completed, but in this case except the one ingredient that is motive none else could be proved.

In the case of *Jagga Singh Vs. State of Punjab A.I.R 1995 S.C, 135*, the Supreme Court has held that, it is fundamental maxim of criminal jurisprudence that the suspicion and conjuncture are no substitute for proof.

In the case of *State of Punjab Vs. Bhajan Singh, A.I.R 1975, Supreme Court 258*, the Supreme Court has held that suspicion by itself however strong, it may be, is not sufficient to take the place of proof.

In the case of *State of Goa Vs. Sanjay Thakran (2007) 3 S.C.C 755*, the Supreme Court held that the Court shall take utmost precaution in finding the accused guilty only on the basis of circumstantial evidence.

In the case of *Ashish Batham Vs. State of M.P, A.I.R 2002, S.C 3206*, the Supreme Court held that if the charge is graver, greater has to be the standard of proof, the Court must keep in mind that there is a long mental distance between “*may be true*” and “*must be true*”.

In the case of *State of Maharashtra Vs. Sukhdev Singh, A.I.R 1992 Supreme Court Page 2100*, the Supreme Court held that in the absence of reliable evidence it is unwise to act on mere suspicion.

In this case except mere suspicion on the part of informant and the injured there is no any other evidence to conclude that only accused persons had committed the offence.

Hon'ble Supreme Court in the case of *S. Govindaraju Versus State of Karnataka, (2013) 15 Supreme Court Cases 315* has held as under:-

"It is a settled legal proposition that in exceptional circumstances, the appellate court, for compelling reasons, should not hesitate to reverse a judgment of acquittal passed by the court below, if the findings so recorded by the court below are found to be perverse i.e if the conclusions arrived at by the court below are contrary to the evidence on record, or if the court's entire approach with respect to dealing with the evidence is found to be patently illegal, leading to the miscarriage of justice, or if its judgment is unreasonable and is based on an erroneous understanding of the law and of the facts of the case. While doing so, the appellate court must bear in mind the presumption of innocence in favour of the accused, and also that an acquittal by the court below bolsters such presumption of innocence."

In the case of *Gangabhavani Versus Rayapati Venkat Reddy and Others, (2013) 15 Supreme Court Cases 298*, Hon'ble Supreme Court has held as under.

"This Court has persistently emphasised that there are limitations while interfering with an order against acquittal. In exceptional cases where there are compelling circumstances and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the acquittal by the lower Court bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference."

In the case of *Sharad Birdhi Chand Sarda Vs. State Of Maharashtra 1984 Supreme Court AIR - 1622*, the Supreme Court pointed out reiterating the cardinal principle of law that where the facts placed before the Court point out two views, one of the guilt of the accused and another to his innocence, the Court should give the benefit of the view, which is favourable to the accused.

In this case it has been proved that the witnesses had not seen and recognize the accused persons committing the offence on spot. Therefore, it can not be said that it is a case of direct evidence. This Court is of the view that it is a case based on circumstantial evidence, in which all the chains of the circumstances are not completed, except only one ingredient that is motive, no other ingredient such as last seen or any extra judicial confession or any recovery has been proved.

24. In all attending circumstances on the basis of evidence, the lower court has rightly come to the conclusion that the prosecution has not been able to prove the case beyond reasonable doubt, therefore, trial court has rightly acquitted the accused persons. This Court is also of the considered view that there is no sufficient evidence and attending circumstances to interfere with the judgment of the acquittal of the lower court, therefore this appeal lacks merit and is hereby liable to the dismissed.

Accordingly, the appeal is **dismissed**.

The Lower Court Record be sent back to the concerned court with certified copy of this judgment forthwith.

Order Date :- 07.07.2022.

Vinod.

[Umesh Chandra Sharma, J.]

[Om Prakash-VII, J.]