Court No. 55

Criminal Appeal No. 3617 of 2006

Daya Shankar .... Appellant

Versus

State of U.P. .... Opposite Party.

Hon'ble Vinod Prasad, J.
Hon'ble Virendra Singh, J.

(Delivered By the Bench)

Challenge in this appeal by the appellant Daya Shankar is to the judgement of his conviction under section 302 I.P.C. and implanted sentence of life imprisonment with fine of Rs.10,000/- and in default of payment of fine to undergo 6 months further simple imprisonment, dated 5.6.2006, imposed by Addl. Sessions Judge/Special Judge (E.C. Act) Jaunpur in S.T. No. 252 of 1995, State Vs. Daya Shankar and others. By the same judgement trial court has acquitted three other accused namely Lal Man, Ram Niranjan and Moti Lal.

Encapsulated prosecution allegations as are decipherable from written report Ext. Ka.1 and disclosed during trial by the informant Tilakdhari, P.W.1 are that Tilakdhari (informant) Dharmraj (Deceased) and Jagdish, P.W.2 are the sons of Bhagirathi, a resident of village Katka, P.S.Sarpataha District Jaunpur. Dhramraj being eldest of the three looked after the family affairs, litigation and was the sole earning member of the family. Jangali a resident of the same village had three sons Nirmal, Moti and Ram Niranjan. Ram Niranjan has also three sons namely Daya Shankar, Lal Mani and Rajendra. Out of this pedigree Moti, Ram Niranjan, and Lalman since acquitted were accused in the incident in question along with present appellant. Ram Niranjan was litigating with the informant since prior to the murder of the deceased regarding agriculture land dispute and because of the

said reason accused nurtured animosity with the deceased as he used to look after the litigation and was the sole earning member of the informant's family.

On 10.10.1994 at 6.30 p.m. informant along with his son Jagdish (PW2) were returning to their house from their agriculture field after plucking tomato and cauliflower saplings, when, from a distance of 30 to 35 paces, they saw all the accused Daya Shankar Kewat (armed with Gadasa), his brother Lal Mani(armed with a sickle),their father Ram Niranjan and uncle Moti (both armed with Lathis) standing near the cot of Dharamraj, who was indisposed and was sleeping in the verandah. By the time informant and his son Jagdish reached to a distance of 15 paces from the deceased appellant Daya Shakar twice assaulted Dharamraj from his Gadasa and rest of the three accused instigated him to kill. Accused also moved towards the informant and Jagdish with an intention to cause harm to them but, because both the witnesses raised the hue and cry, they left the place of the murder and fled away.

Informant Tilakdhari got a written report Ext.Ka.1 scribed by Ram Awadh D.W.1, covered a distance of 8 kms and lodged it at police station Sarpataha, the same day at 8.40 p.m. as crime number 149 of 1994, under section 302 I.P.C.

Head Constable Surya Prakash Pathak, prepared the chik F.I.R., Ext. Ka 3 and the GD entry, Ext. Ka 4. S.O. Indrajit Singh was not present at the time of registration of FIR and therefore, through constable Indrajit Singh, he was informed about the crime. I.O. conducted the inquest , made site plan, recorded the statements of witnesses under 161 Cr.P.C. and finding a prima facie case against all the accused charge sheeted them vide Ext. Ka 14. PW 6 Devdhar Diwedi, had proved various documents prepared by I.O. during the course of investigation as the I.O. since dead could not be examined in the trial.

Autopsy on the dead body of the deceased was conducted on 11.10.94 at 3.30 P.M. by Dr. Ajaj Ahmad who found following injuries on the dead body of the deceased :-

1. Incised wound sharp cutting wound 6 cm x .5 cm x bone deep on front of neck 10cm below the mandible. Clotted blood was present.
2. Sharp cutting wound 15 cm x 4 cm x bone deep on front of neck 1 cm below injury no. 1.

One day had lapsed since his death and rigor mortis was present in both the extremities. Internal examination had revealed that spinal vertebra of the deceased was cut. Head was attached with trunk through skin. Cause of death in the opinion of the doctor was shock and haemorrhage as a result of sustained injuries.

During the trial prosecution in order to bring home the guilt of the accused persons examined total six prosecution witnesses, out of whom Tilakdhari P.W.1 (informant), Jagdish (eye witness) P.W. 2, and Smt. Manraji (wife of informant and mother of deceased) P.W. 3 are the witnesses of facts. Dr. Ajaj Ahmad P.W. 4, Rajit Ram Tiwari, P.W. 5, and Devendra Dhar Dwivedi P.W. 6 are formal witnesses.

During their depositions in the trial all the three witnesses of facts supported the prosecution version and deposed the same facts which were contained in the FIR Ext. Ka 1. They have anointed specific role to the present appellant as the main culprit , who had caused both the fatal injuries to the deceased. All theses witnesses were subjected to lengthy cross examination but nothing material could be brought about by the defence to dislodge their versions. Dr. Ajaj Ahmad in his deposition supported the prosecution case and evidenced that the sustained injuries by the deceased were caused by sharp edged weapon.

After the prosecution evidence were over, accused persons were

examined under section 313 Cr.P.C. and they took a defence that the prosecution case is false and they had been falsely implicated. Accused persons examined the scriber of the F.I.R. Ram Awadh in support of their defence case as D.W. 1.

Trial Court vide his impugned judgment and order found the prosecution case proved to the hilt against the appellant only and therefore it convicted the appellant under section 302 I.P.C. simplicitor and implanted the sentence of life imprisonment with a fine of Rs. 10,000/- with additional direction that in default of the payment of fine, the appellant shall undergo 6 months simple imprisonment. It however acquitted rest of three accused Lalman, Ram Niranjan and Moti giving them benefit of doubt. Order of acquittal of those three accused has attained finality as the same was not challenged either by the prosecution or by the informant. Hence this appeal by the present appellant challenging his aforesaid conviction and sentence.

We have heard Sri Syed Mehmood, learned counsel in support of this appeal and learned A.G.A. in opposition.

Assailing and criticising the impugned judgement it was submitted by learned counsel for the appellant that three witnesses of fact are not reliable and they were not present at the spot. It was further contended that the medical evidence is inconsistent with ocular testimony and consequently recorded conviction of the appellant is bad in law. It was further argued that scriber of the F.I.R. did not support prosecution case and he has narrated true facts as D.W. 1 and therefore FIR looses it's authenticity and credibility and no reliance can be placed on it. Further contention of the learned counsel for the appellant is that the inquest was conducted on the following day and therefore, probably, the F.I.R. was not in existence and was not lodged at the date and time alleged by the prosecution. No recovery of weapon was made from the appellant and the I.O. has not been examined during the trial. Concludingly it was urged that instant

appeal by the appellant deserves to be allowed and appellant be acquitted of the charge levelled against him. It was further submitted that site plan does not show the presence of the blood and hence place of incident is also not fixed.

Smt. Raj Lakshami Sinha, learned A.G.A. while refuting appellant's submissions contended that the witnesses of facts PW1 to PW 3 are reliable and trustworthy and their evidence is also cogent and unimpeachable and there is no reason for this Court to set aside appellant's conviction and sentence She submitted that the appeal being devoid of substance deserves to be dismissed .

We have heard learned counsel for the appellant at great length and have critically examined the original record of the trial court as well as of this appeal our selves.

Summation of evidences on record compel us not to take a contrary view than that of the trial court. The three witnesses of facts are none else than the father, mother and brother of the deceased. We do not find any merit in the submissions canvassed by learned counsel for the appellant.

Ab initio incident had occurred in twilight and P.W. 1 to 3 are family members of the deceased. They have no reason to falsely implicate the appellants sparing the real culprit. Trial Court record is bereft of any material to indicate that but for the appellant any body else had any axe to grind from the deceased. It is an incident occurred in day light and, since the appellant is a resident of the same village, hence there was no difficulty in his identification by all the eye witnesses. Deceased was the eldest son, educated and the sole earning member of the family. He was looking after family litigation also and therefore he must have been the eyesore to the accused. By his elimination the accused must have gained advantageous edge over family of the informant and therefore they have eliminated him. Thus appellant had a strong motive to commit the crime.

Cross examination of the three witnesses of facts shows that they have categorically stated that the incident had occurred at the date and time stated by them and it was the appellant who had chopped off the neck of the deceased by Gadasa carried by him. In respect of time, place and manner of assault, prosecution witnesses have been supported by defence witness D.W. 1 also, whose testimony confirms said facts being correct. PW 1, informant Tilakdhari is categorical in his statement that incident occurred , when sun light was still there and inquest on the dead body was conducted next day in the morning. At the time of the incident deceased was sleeping since he was indisposed since last three or four days. PW 1 is an aged man of fifty years and his deposition in court was recorded after a long interval of six years and therefore some minor omissions and contradictions occurred in his depositions lends credence to the truthfulness of his depositions. Although he was subjected to searching cross examination but the defence has not been able to discredit his testimony even slightly. He has denied both the suggestions that he had not seen the incident which had not occurred as alleged by him. He had also denied that the incident had occurred at night and Ext.Ka.1 was not scribed by Awadhraj and that the appellant had been falsely implicated. PW 2 Jagdish, who is the son of the informant and PW 4 Smt. Manraji , wife of informant have supported the informant on all material aspects of the case. There is nothing in their depositions which can make them unreliable and untrustworthy witnesses. Their evidences is clear,cogent and confidence inspiring. Counsel for the appellant has failed to point out any extenuating circumstances from their depositions which can suggest non involvement of the appellant in the murder. Further learned counsel has failed to point out any defect in the evidence of P.W. 1, 2 and 3 so as to make them unreliable and witnesses unworthy of credence. His criticism that eye witnesses did not make any attempt to save the deceased when he was being

assaulted which indicates their non presence at the spot is wholly unacceptable. All the accused were armed and at least two of them were armed with deadly weapons, whereas informant, his son Jagdish and wife Manraji were bare handed. Causing two blows on the body of the deceased must not have taken more than a few seconds. Accused have started towards the prosecution witnesses also to assault them as has been deposed by them. In such a situations ,if, the prosecution witnesses could not muster the courage to come close by the accused no exception can be drawn of their such a conduct , which we find is in consonance with the human fear factor. Their conduct is natural and it does not diminish the evidentiary value of their depositions. It is because of this reason that the witnesses did not save the deceased. No question was asked from all the fact witnesses as to within how much time incident had occurred and therefore, the criticism by the appellant counsel is wholly unfounded. Absence of such a cross examination was ostensibly for the reason that the defence was aware that the incident must not have taken more than few seconds.

Appellants counsel also made criticism of the evidence of PW 3 Smt. Manraj to submit that her testimony is not truthful, but we find that she is an ill-literate lady aged about 50 years. Her deposition in court was recorded after a long gap of more than six years. She has supported prosecution version in all its material aspects. She has testified that at the time of the incident day light was still there and deceased was ailing on that day. Her husband and son had gone to the field to uproot saplings. She is clear that the accused did not assault her. She had supported PW 1 by deposing that a lantern was kept burning throughout the night after the murder. She has denied the suggestion that the accused did not murder her son nor she had seen such an incident. She has specifically denied that the deceased was murdered in the night by some unknown persons. some discrepancy was bound to occur in her deposition before the Court. They should not

be stretched to a purile limits to discard credible trustworthy evidence of the mother, who will be the last person to implicate an innocent falsely in the murder of her own eldest son who was the sole bread earner. In such a view we repel the submissions made by learned counsel for the appellant that the three witnesses of fact did not witnessed the incident.

Evidence of the doctor further cements prosecution allegations as the same is consistent with it. Proved documents prepared during investigation supports the case of the informant farther and anoints guilt on the appellant .

Coming to another submissions that there is discrepancy between the ocular testimony vis a vis with medical evidence we find the said contention wholly unmerited. The doctor has noted two sharp cutting wounds found on the person of the deceased. The dimensions of those injuries and its seat unerringly indicate that the said injuries were caused by sharp edged cutting weapon like Gandasa. We are not supposed to hypothesis in the realm of suppositions to disbelieve ocular testimony which is trustworthy and hence repel the criticism argued by learned counsel for the appellant.

Coming to another argument that the scriber of the F.I.R. Ram Awadh had taken a somersault by appearing in the witness box as DW 1 to negate the prosecution story, we only observe this much that according to his deposition incident had occurred at the same time and place as was stated by the prosecution. His deposition that he had scribed the F.I.R. at the dictation and compulsion of the I.O. is totally absurd. He had not made any complaint to any of the authorities, prior to his deposition in Court, in that respect. He even did not inform the family members of the appellant that if they want, they can lodge complaint against their false implication and he will support them in the said charge before the higher authorities. We find that the scriber of the F.I.R. has changed the sides because of the reasons

best known to him but we hold him to be liar. His conduct and silence makes him an unreliable and untruthful witness and therefore we reject his testimony out right.

Coming to some other submissions raised by the learned counsel for the appellant that the I.O. has not been examined in the case, and in the site plan no place has been shown for recovery of blood and no recovery of weapon has been made, we find the said submissions without any force. These facts could not discredit the depositions of the witnesses of facts nor can they dislodge otherwise confidence inspiring ocular evidence. Laxity on the part of the I.O. in conducting the investigation, does not make the deposition of truthful witnesses unreliable. In our view all the above contentions were raised before us only to be rejected and we hereby reject the same.

Concluding our discussions, we find that the prosecution has been able to successfully prove the guilt of the appellant and therefore we confirm his conviction and sentence recorded by the trial Judge through the impugned judgement. Since the sentence which has been implanted is the minimum, there is no scope for reducing it as well.

We don't find any reason to interfere in this appeal, which stands dismissed. Appellant is already in jail. He shall remain in jail to serve out remaining part of his sentence.

Appeal dismissed.

Let a copy of this judgement be certified to the trial Court for its intimation.

Dt. 24.8.2009

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