

AFR
[RESERVED]
on 12.3.2021
Delivered on 24.3.2021

Court No. 86

Case :- CRIMINAL APPEAL No. - 1611 of 2018

Appellant :- Kapil

Respondent :- State of U.P.

Counsel for Appellant :- Anuj Chaudhary, Akhilesh Kumar

Mishra, Chandrajeet, Santosh Kumar Dubey

Counsel for Respondent :- G.A.

Hon'ble Subhash Chand, J.

1. The instant Criminal Appeal is against the judgment dated 20.1.2018 of conviction and sentence passed by the court in ST No. 429 of 2015 (State Vs. Kapil and others) arising out of case crime no. 374 of 2014 P.S. Pilkhuva, District Hapur whereby the appellant Kapil was convicted for the offence under section 307/34 of IPC and sentenced with rigorous imprisonment of 7 years and a fine of Rs. 5,000/- and in default of payment of fine additional imprisonment of three months was to be undergone.

2. The brief facts giving rise to this Criminal Appeal are that informant Dharmveer Singh, son of late Bhagirath Singh resident of Mohalla Jatan, Pilkhuva, District Hapur moved written information with the police station concerned with these allegations that on 10.3.2014 at 6.00-O'clock evening he alongwith his son Vikas and the brother-in-law of his son namely Sumit were exchanging talk at the crossing nearby his house. At the same time Kapil, son of Bablu, Gaurav, son of Shailendra, Bablu son of Sukhpal all resident of Madaia Jatan, Pilkhuva came by Motorcycle of which speed was too fast. The son of the applicant asked them to control the speed and to drive the motorcycle slow just to avoid any mishappening. On this issue all the three accused persons who were armed with weapon hurled abuses to his son and exhorted to his companion to open fire with intend to cause death of his son whereby Vikas opened fire which hit to the stomach of

his son Vikas who fell down on the spot due to sustaining injury. The informant made noise whereby the persons of the locality attracted there. All the three accused persons fled away brandishing their country made pistol after having left the Motorcycle at the place of occurrence. He also saw the whole occurrence and recognized the assailants. The condition of his son Vikas was critical. He was rushed to the Saraswati Hospital. After first aid he was referred to Colombia Asia Hospital where he underwent treatment. On this written information Case Crime No. 374 of 2014 was registered against the accused Kapil, Gaurav, Bablu, under section 307 and 504 of IPC and the Investigating Officer after having concluded the investigation filed charge sheet against all the three accused persons on which cognizance was taken by the Magistrate concerned who committed the case for trial to the court of Sessions.

3. The trial court summoned the accused persons and charge was framed against the accused Kapil, Gaurav and Bablu under sections 307/34 and 504 of IPC which were read over and explained to the accused persons. The same was denied by them and demanded for trial.

4. On behalf of prosecution to prove the charge against the accused persons in documentary evidence filed the written information Ext. Ka-1, injury report of Vikas Ext. Ka-2, Charge sheet Ka-3, recovery memo in regard to taking into possession, blood stained cloth of injured Vikas Ext. Ka-4, Site plan of the place of occurrence Ext. Ka-5, recovery memo under section 27 of the Evidence Act Ext. Ka-6, discharge summary and progress report of Colombia Asia Hospital, Ext. Ka-7, Check FIR, Ka-8.

5. On behalf of prosecution in ocular evidence examined PW-1, Dharamveer, PW-2, Vikas, PW-3 Dr. Tejpal Singh, PW-4 SI Roshan Lal, PW-5, SI D.D. Gautam, PW-6, Dr. Sushil Photedar, PW-7 and HCP Mahipal Singh.

6. On behalf of prosecution statement of the accused persons were recorded under section 313 Cr.P.C. All the accused persons denied incriminating circumstances in evidence against them and stated that they have been falsely implicated on account of groupsim of the village and injured was flying kite on the date of occurrence, someone opened fire in air which hit to Vikas consequently he sustained injuries.

7. On behalf of accused persons no defence evidence was adduced.

8. Trial court after hearing learned counsel for the rival parties passed the impugned judgment of conviction and sentenced to the appellant as stated above.

9. Aggrieved from the impugned judgment of conviction and sentence, this criminal appeal has been preferred on behalf of the appellant Kapil on the ground that the impugned judgment is based on perverse and illegal finding and the trial court has not appreciated the evidence in proper perspective. There is no explanation of delay in lodging the FIR and the weapon used in commission of crime was not recovered and there is no independent witness of the occurrence. There is also discrepancies in the statement of prosecution witness in regard to the place of occurrence. The trial court has not considered the pleas raised on behalf of the appellant and convicted the appellant on the wrong appreciation of the evidence. Accordingly, prayed to allow this criminal appeal and to set aside the impugned judgment of conviction.

10. Learned counsel for the appellant has submitted that the conviction of the appellant is based on the evidence of interested and related witnesses. No independent witness has been examined and on this ground contended to discard the prosecution case.

11. On behalf of prosecution the place of occurrence is the crossing nearby house of informant Dharmveer Singh. On the date

of occurrence on 10.3.2014 at 6:00-0' clock of evening informant Dharamveer Singh along with his son Vikas and the brother-in-law of his son namely Sumit were standing and exchanging talk. At the same time the accused Kapil, Gaurav and Bablu came by the Motorcycle which was driven at a very high speed. The son of informant asked the accused persons to drive the Motorcycle slowly so as to avoid any accident. On this, all the accused persons hurling abuses and on the exhortation of Bablu all the accused persons opened fire. One bullet hit the stomach of Vikas. He was immediately rushed by **PW-1 Dharamveer** to Sarswati Hospital from where after first aid he was referred to Colombia Asia Hospital, Meerut. This prosecution case has been proved by the statement of PW-1 Dharamveer, informant who had lodged the FIR and the written information of the same Ext. Ka-1 was proved by him.

12. PW-2 Vikas is the victim and and impugned witness of the occurrence. This witness has stated that on the date, time and place of occurrence he along with his father and brother-in-law Sumit were talking at the crossing. The accused persons came by Motorcycle which was driven with high speed on being opposed by him accused persons hurled abuses and opened fire on the exhortation of Bablu and the bullet which was fired by Kapil hit to his stomach.

13. Therefore, from the statement of both these witnesses whose presence is not doubted at the place of occurrence, it is proved that the firearm opened by Kapil which hit to the stomach of Vikas.

14. The Investigating Officer in the list of witnesses have not interrogated any independent witness of the occurrence and only three witnesses of the fact were shown in the list of the charge sheet i.e. informant Dharamveer, injured Vikas and Sumit.

15. Admittedly, Sumit was not examined by the prosecution during trial. So far as the evidenciary value of PW-1 Dharmveer,

PW-2 Vikas are concerned, although both the witnesses are related being father and son respectively yet their presence at the place of occurrence is not shaken in cross examination by the defence counsel.

16. It is settled law that the testimony of injured holds more value as a injured will never conceal the real culprit. So far as the testimony of a related witness is concerned, if the presence of relative witness at the place of occurrence is not doubted, same can not be disbelieved on the sole ground being relative.

Hon'ble Apex Court held in *Vijay Shankar Sinde Vs. State of Maharashtra AIR 2008 SC 1198* the testimony of a injured witness holds more credence. Normally, he would not shield the real culprit.

Hon'ble Apex Court held in *Ashok Kumar Chaudhari Vs. State of Bihar AIR 2008 SC 2436* the relationship *per se* does not affect the credibility. Non examination of public witness by itself does not give rise to adverse inference against the prosecution when the evidence of injured witness is reliable.

17. The injury report of injured Vikas Ext. Ka-2 has been proved by **PW-3 Dr. Tejpal Singh** in which the gun shot entry wound and exit wound is mentioned on the lower chest of injured Vikas. PW-3 Dr. Tejpal Singh also kept this injuries under observation and advised X-Ray and USG of whole of the abdomen.

PW-6 Dr. Sushil Photedar of Colombia Asia Hospital proves the discharge summary report of patient Vikas Ext. Ka-6 and papers related to the same Ext. Ka-7. This witness also says that he operated the injured Vikas. There were two gun shot wounds in his stomach; entry wound and exit wound; blackening and tattooing around entry wound was in size .5 cm x.5 cm; while exit wound was 1 cm x 1 cm.

Therefore, the ocular evidence adduced on behalf of

prosecution in regard to firearm injury in the stomach of injured Vikas is also corroborated with the medical evidence adduced on behalf of prosecution.

18. Learned counsel for the appellant contended that the Investigation Officer did not recover the weapon used in commission of crime. No live or empty cartridge were recovered from the place of occurrence. As per prosecution case firearms were opened by all the accused persons. Moreover, the blood stained cloths of the injured which were taken in custody by the Investigating Officer, same were not sent for examination to FSL and this lacunae in investigation is fatal to the accused appellant.

19. Admittedly, no weapon was recovered during investigation despite taking the police custody remand of accused Kapil on his confessional statement as same could not be recovered from the place where it was concealed by the accused. It is also admitted that the blood stained cloth; the recovery memo of the same have been proved by PW-5 Sub-Inspector D.D. Gautam as ext. Ka-6; but the same were not sent to FSL for examination. This fact is admitted to PW-5, Sub-Inspector D.D. Gautam. Admittedly, no empty or live cartridges were recovered by the Investigating Officer from the place of occurrence even blood stained clay and plain clay was not taken by the Investigating Officer in custody. **On account of negligence on part of the Investigating Officer, the prosecution case can not be discarded, if the same is proved from the evidence of the eye-witness also corroborated with the medical evidence.**

20. The Hon'ble Apex Court held in *C Muniappan and others Vs. State of Tamil Nadu (2011) 1 SSC 470 SC* the defect in investigation by itself is not a ground of acquittal. It is obligatory upon the Court to examine the prosecution witness and to see whether lacunae in investigation is affecting the object of finding truth.

21. The Hon'ble Apex Court held in *Lakhan Sao Vs. State of Bihar and another (2009) 9 SCC 82* para 18 appreciation of the evidence in criminal trial-non recovery of the pistol or spent cartridges does not detract from the case of prosecution where the direct evidence is acceptable.

22. The Hon'ble Apex Court held in *Yogesh Singh Vs. Mahabir Singh and others (2011) SCC 195* in para 47, mere non recovery of weapon does not falsify the case of prosecution where there is ample unimpeachable evidence.

23. In the present case the prosecution has been successful in proving its case with reliable and cogent ocular evidence which is corroborated with the medical evidence. The role of the appellant Kapil has been assigned specific who opened fire and the bullet hit the stomach of injured Vikas. As such, the impugned judgment of conviction of the appellant Kapil for the offence under section 307 IPC does not bear any infirmity and same needs no interference.

24. Therefore, in view of re-appreciation of the evidence on record this criminal appeal is hereby dismissed and the impugned judgment of conviction and sentence passed in ST No. 429 of 2015 (State Vs. Kapil and others) arising out of case crime no. 374 of 2014 P.S. Pilkhuva, District Hapur is affirmed. The appellant has to serve out the sentence as awarded by the court below.

25. Let the copy of judgment/order be certified to the court below for necessary information and follow up action.

(Subhash Chand, J.)

Dated: 24.3.2021

SKS