

RAM NARAYAN

v.

STATE OF U.P.

(Criminal Appeal No.1339 of 2005)

APRIL 22, 2009

[DR. ARIJIT PASAYAT AND ASOK KUMAR
GANGULY, JJ.]

Penal Code, 1860:

ss.302/149, 307/149 and 436/149 – Prosecution of 9 persons – Acquittal by trial Court – Pending appeal three accused died – High Court convicting one of the remaining accused and acquitting the others – Held: Analysis made by High Court does not suffer from any infirmity – On the contrary, judgment of trial Court was based on surmises and conjectures – High Court was justified in recording conviction.

The appellant and eight others were prosecuted for commission of offences punishable u/ss.147, 148, 302/149, 307/149 and 436/149 IPC in connection with a chain of three incidents taking place at different places. The prosecution case was that there was enmity between the complainant group and the accused party. On the day of incident at about 7.30 p.m., the accused armed with bombs, a gun, a country made pistol, spear, pharsa and lathis, went to the shop of 'S', the younger brother of the informant, and fired at him from the gun and the pistol and also threw bombs at him. 'S' anyhow saved himself and ran from that place. The accused then went to the shop of the informant in search of 'S', but not finding him there, threw bombs and also fired some shots. One of the accused set fire to the shop of the informant. Then the accused went to the house of the informant and not finding 'S' there, threw a bomb at 'GP'. One of the

- A accused also fired at him from the pistol. 'GP' died at the spot. The trial Court found that though incidents were reported to have taken place at 7.30 p.m. but FIR was lodged belatedly at 8.30 p.m. with deliberation; that the semi-digested food found in the stomach of the deceased
- B suggested that he must have died at 5.30 p.m. and not at 7.30 p.m.; and that regarding the source of light to be an electric bulb, report of Electricity Department was not on the record nor anybody from the said Department was examined to prove the case. On these premises mainly,
- C the trial court doubted the prosecution case and acquitted all the accused. The High Court, however, set aside the acquittal as regards the appellant and convicted him. Three of the accused having died pending appeal, their appeal abated. The High Court maintained acquittal as regards the remaining five accused.
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Dismissing the appeal, the Court

- HELD: The analysis made by the High Court does not suffer from any infirmity. On the contrary the trial court's
- E judgment proceeded on surmises and conjectures and was based on totally inappropriate appreciation of the evidence. Relevant aspects were not considered and irrelevant aspects were taken into account by the trial court. Therefore, the High Court was justified in recording
- F conviction. [Para 13] [828-C-E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1339 of 2005.

- From the Judgment & Order dated 4.4.2005 of the High
- G Court of Judicature at Allahabad U.P. in Government Criminal Appeal No. 1270 of 81.

Abhisth Kumar, Archana Singh, Shantanu Krishna and Pankaj Sharma for the Appellants.

- H S.K. Dwivedi, Vivek Singh, Prashant Chaudhary, S.K.

Mishra and Praveen Swarup, for the Respondents.

A

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Challenge in this appeal is to the judgment of a Division Bench of the Allahabad High Court setting aside the judgment of acquittal recorded by the then III Additional Sessions Judge, Deoria in Sessions Trial No.347 of 1978. The accused persons faced trial for alleged commission of offences punishable under Sections 147, 148, 307 read with Section 149, Section 436 read with Section 149 and Section 302 read with Section 149 of the Indian Penal Code, 1860 (in short the 'IPC'). Nine persons faced trial. All of them were charged under Section 307 read with section 149, 436 read with section 149 and 302 read with section 149 I.P.C. Indra Jeet, Awadh Narain and Raj Banshi Tiwari were charged for rioting under section 147. I.P.C. whereas the rest under section 148 I.P.C. The incident occurred on 7.7.1978 at about 7.30 P.M. at three places within Police Station Kotwali, District Deoria. The F.I.R. was lodged the same night at 8.20 P.M. by Brij Raj Tiwari (PW-1). One Gunj Prasad Tiwari (hereinafter referred to as the 'deceased') was murdered in the incident whereas Subhash (PW 2), Devi Prasad Pandey (PW 5) and Virendra Kumar sustained injuries.

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2. The case of the prosecution as unfolded during trial through F.I.R. and the evidence may be related thus. Brij Raj Tiwari (PW 1) resided in village Deoria Ram Nath, Police Station Kotwali, District Deoria. The accused were also the residents of the same place. Sarvajeet, Indrajeet and Jagdish accused were real brothers. Om Prakash was the nephew of Sarvajeet and other. Durga Prasad was the son of accused Awadh Narain. The accused Rajbanshi Tiwari and Raj Kishore were Patidars of accused Awadh Narain and the accused Awadh Narain and accused-appellant belonged to the group of the remaining accused. Enmity on account of litigation was going on between the family of the informant Brij Raj Tiwari PW 1 on the one hand and the accused Sarvajeet and Raj Kishore

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A on the other. Earlier to the present incident, on the eve of Holi
some one had inflicted a knife blow on the accused Sarvjeet
in which Subhash Tiwari PW 2 (brother of the informant) was
implicated as accused. Sometime thereafter, Hari Ram first
cousin of accused Durga was also inflicted knife blow by
B someone in which the informant, his father Guru Prasad the
deceased, Mahasarey, Subhash Tiwari (PW-2) and Jai
Shankar were implicated as accused. Proceedings under
sections 107/117 of the Code of Criminal Procedure, 1973 (in
short the 'Code') had also been drawn between the informant
C and others on one side and the accused Durga and Hari Ram
on the other. In front of the door of the house of the informant
there was a flour mill adjacent to which on the northern side the
house of the accused Durga Prasad and Hari Ram was
situated and on the eastern side thereof the house of the
D accused Sarvjeet was situated at a distance of about 10 paces
from the flour mill. During the thrashing season, dust and sound
came to be produced because of generation of the flour mill to
the disliking of the accused. The accused Sarvjeet, Durga
Prasad and Hari Ram had applied for electric disconnection
E of the informant before the Electricity Department prior to the
present incident in which , the accused Raj Kishore was cited
as a witness. A case under Section 133 of Code was instituted
against the informant by the police which came to be decided
in favour of the informant. So, there was a long string of enmity
between the two sides.

F
The present incident occurred in three parts. At about 7.30
P.M. on 7th July, 1978 Subhash- the younger brother of the
informant was sitting at his grocer's shop on the crossing in front
of the house of Sri Vishwa Nath Pandey, Advocate. All the
G accused with 2 or 3 other companions reached there. Sarvjeet
and Om Prakash had bombs in their hands; Jagdish had a gun;
Ram Narain had country made pistol; Raj Kishore had a spear.
Durga Prasad had a Pharsa and the remaining accused had
lathis. As soon as they reached the shop of Subhash, accused
H Sarvjeet and Om Prakash attacked Subhash by means of

bombs, Ram Narain by means of country made pistol and Jagdish by means of gun. Subhash ran for his life and anyhow saved himself but was hurt in his leg in this process. This occurrence was witnessed by Jagdish Mani, Chandbali Pasi, Brijesh Tiwari and others.

The second part of the incident was that the accused came running to the grocer's shop of the informant at Bhatwalia Crossing in search of Subhash and not finding him there, threw bombs and also fired. The accused Indrajeet set fire to the shop of the informant which was reduced to ashes. Mahasarey-brother of the informant, Devi Prasad Pandey, Surendra Prasad, Rajesh Singh and others witnessed this incident. Then the accused came running to the door of the house of the informant where Guru Prasad the deceased was present. They inquired from him about Subhash saying that he would not be left alive that day. Guru Prasad wanted to know as to what the matter was. But the accused Sarvjeet instigated the remaining accused saying that if Subhash was not available, he (Guru Prasad) should be killed. Instantaneously, Sarvjeet attacked Guru Prasad Tiwari throwing a bomb and Ram Narain by means of the country made pistol. Guru Prasad died on the spot. The incident was witnessed by the informant, Ram Darash Tiwari, Bhagirathi Yadav, Nand Kishore, Hari Prasad and Munni-sister of the informant. The accused persons then ran away. At the time of the incident electric light was available at the door of the informant. This was the third part of the incident.

Leaving the dead body of his father at the door, the informant went to the Police Station, and lodged the F.I.R. resulting in registering of the case. Investigation was taken up by Tota Ram Gupta (PW-13). It may also be related here that the injuries of Subhash Tiwari (PW 2), Virendra and Devi Pandey (PW-5) were examined on 7.7.1978 at 10.45 P.M., 10.55 P.M. and 11.05 P.M. respectively by Dr. J.N. Thakur (PW 8).

After completion of investigation charge sheet was filed

A and the accused persons faced trial as they denied accusations.

B Thirteen witnesses were examined to further prosecution version. The trial Court held that the accused persons were entitled to acquittal as the witnesses examined did not establish the accusations. An appeal was filed questioning the acquittal.

C The High Court found that PWs 1, 4 and 6 who are eye witnesses clearly established the accusations. It also found that the source of light was mentioned in the FIR. Accordingly, the acquittal was set aside and appeal was allowed qua the present appellant.

D It was noted that the appeal had abated in respect of accused Sarveet, Om Prakash, Raj Kishore and Awadh Narain who died during the pendency of the appeal. The acquittal recorded for the remaining accused persons namely, Indrajeet, Jagdish, Ram Narain, Durga Prasad and Raj Banshi Tewari was maintained.

E 3. Learned counsel for the appellant submitted that the aspects highlighted by the trial Court to record acquittal should not have been upset by the High Court when the view taken by the trial Court was not perverse and was a possible view.

F 4. Learned counsel for the respondent -State on the other hand supported the judgment of the High Court.

5. The various aspects which weighed with the trial Court to record acquittal and which weighed with the High Court to record conviction need to be noted.

G 6. The first circumstance highlighted by the trial Court related to the written report i.e. FIR. It noted as follow:

H An FIR has been lodged at the P.S. after deliberation and consultation including that of police and does not appear to have been prepared by the informant

only, on his own showing and showing and contained twisted and false version of occurrence and was also ante timed. A

That incident took place about 7.30 p.m. on 7.7.1978 and the written report was prepared and lodged at P.S. at 8.20 p.m. even when the occurrence itself had taken place at three different places in quick succession of each other and had taken about half an hour or so in all even when the P.S. was 1= k.m. far from the place of occurrence. B

That the informant (PW-1) had not even witnessed the occurrence at first two places but the written report shows as itself that PW-1 had witnessed the entire occurrence from start to end at all the three places as because it was written in that very fashion. C D

That in evidence the informant (PW-1) admitted that neither PW-2 nor PW-3 or any one else as a matter of fact had told him the names of the witnesses of the first and second incidents yet their names do find place in the written report which PW-1 was not able to explain at all. E

All the PWs examined including informant PW-1 Brij Raj Tiwari started changing the time of occurrence at the stage of evidence as in the FIR the gap was only 50 minutes. PW-1 says he reached his house at 7.00 p.m. and G.P. Tiwari was shot dead within 4-5 minutes showing that the first two incidents did not take place at 7.30 p.m. Injury to Subhash Tiwari is not mentioned in the GD, Ka-11. Subhash (PW-2) says that occurrence took place at 7.15 p.m. at his grocery shop. Kumari Munni (PW-4) and Nand Kishore (PW-6) had not told any time to IO. In exhibit ka-6 copy of the FIR time of occurrence is mentioned as 7.45 p.m. In exhibit Ka-14 challan of dead body, the time is 7.45 p.m. In the inquest report there is overwriting about time. In exhibit ka-6 to ka-9 the letters written for medical H

A examination of injured there is no crime number or sections of crime mentioned. This shows ante timing.

On the other hand the High Court noted as follows:

B The Trial judge had on justification to criticize the F.I.R as being too prompt.

C FIR was lodged by PW-1 on getting information of the first two parts of the incident from his brothers Subhash (PW-2) and Mahasarey (PW-3) and there was nothing wrong in including full particulars of those two parts of the incidents. Rather by giving details of earlier parts in the FIR it appears to be a genuine document ringing of spontaneity. Cloud could not be imported on the 3rd part of the incident:

D 7. The second circumstance relates to the medical evidence qua the food contents. The trial court found as follows:

E That semi digested food (rice, dal, mango) were found in the stomach of Guru Prasad which showed and suggested that at least 2 to 2 = hours prior to his death, the deceased must have taken the meals and if occurrence had taken place at 7.30 p.m. the deceased must have died at about 5.30 which was no body case.

F According to the post mortem examination report the injury No.1 could be caused by a bomb which appears to be wrong because the doctor had also mentioned in the report as well as stated in evidence that the wound showed blacking and tattooing, which was not possible in case it was caused by bomb.

G That the doctor also admitted when cross examined that he had not consulted any ballistic expert and deceased could be injured in a sleeping condition also and wads are generally found in gun.

H That he did not find any pieces of glass, nails or

metallic in the injury No.1 of the deceased and he could not give any definite opinion as to whether injury No.1 could be caused by gun shot on the head from a close range nor he could give definite opinion if it caused by bomb blast.

8. The High Court's findings relating to medical evidence are as follows:

High Court did not agree with the trial Judge that the time of the incident was rendered doubtful because of the stomach contents of the deceased.

That the gist is that the state of stomach found at the time of medical examination is not a safe guide for determining the time of occurrence because that would be a matter of speculation.

That the trial court was not justified in doubting the time of incident on the basis of stomach contents of the deceased.

That the trial Judge wrongly held that the ante mortem injury No.1 of the deceased was not caused by bomb instead it was caused by gunshot.

That the blackening and tattooing around the skin did not mean that it was not a blast injury nor did the recovery of two wadding places from the lacerated brain tissues negate it to be a bomb blast injury.

However, under the stress of cross examination doctor (PW-7) stated that he had not taken the opinion of Ballistic Expert and could not definitely say whether ante mortem injury No.1 was caused by bomb blast or gunshot.

9. The third aspect related to the presence of source of light. The trial court noted as follows:

A That according to the written report the only source
of light present at the scene of occurrence was that of bulb
lighted at the door of the house of informant which was
claimed by the prosecution and report was obtained from
B the Electricity department but even that report was not on
record nor any one examined from the Electricity
Department to prove the case.

10. On the other hand the High Court's finding are as
follows:

C For no good reason the trial Judge doubted the
presence of light at the spot where the third part of the
incident took place.

D In view of the overwhelming evidence on the point of
light on the spot though the bulb glowing at point "F" shown
in the site plan by the I.O. it hardly affected the prosecution
case that the bulb was not produced by the prosecution
at the trial.

E 11. One of the aspects which weighed with the trial Court
related to the ineffective investigation, if any. The same reads
as follows:

That even the investigation of this case was tainted
from start to end on their own showing of the prosecution.

F That alleged enmity and fired cartridge recovered
from the road after the occurrence was 'Gevelot' but
according to the recovery memo it was 'Elly'.

G That not a single line in the case diary was written
by I.O. himself.

H The articles recovered from the scene of the
occurrence were not sent to the police station even next
day of occurrence and were deposited on 9.7.1978 and
all parchas were sent to the police office as late as on

2.8.1978 excepting two but why they were sent so late was not explained either by prosecution or any body examined in this case including I.O.

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12. So far as the analysis of the evidence is concerned the trial court referred to various aspects:

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The very fact that the first two incidents are found to be not proved and concocted, the 3rd incident could hardly be true, especially when FIR is lodged after deliberation and is ante time.

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Brij Raj Tiwari (PW-1) wrote the FIR as if he had seen the first two parts of the incidents though he had not witnessed the same. This shows the extent to which he can go to tell lies. He states that Kumari Munni (PW-4) came out to give clothes to him when the father was killed but PW-4 contradicts him by saying that she came out after hearing the alarms. He mentioned in FIR that Raj Kishore had spear but in deposition he assigned a gun to him and does not say that anyone else had a spear injury to the deceased was not caused by bomb at all. PW-1 admits he was ex convict and involved in lot of litigations. He says he cannot tell the name of person who told him about the first two incident. He had not seen the clothes of Subhash Tiwari (PW-2) nor did he know of the injury of D.P. Pandey (PW-5) yet he mentions these facts in the written report. He says that accused came looking for Subhash and not finding him killed the father but none of them tried to harm him or other members of family. This is strange.

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Kumari Munni (PW-4) changes her story about coming out of the house on alarm being raised. She admits that her mother and other ladies did not come out of the house which is strange. She claims that witnesses had come before the arrival of the accused which is against prosecution story.

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A Nand Kishore (PW-6) is a neighbour. He claims he
was at his door when he heard alarms and on reaching
the scene he saw the accused were inquiring Subhash and
then hurled bomb and then fired on the deceased. This is
B contrary to the versions of PW-1 and PW-4 according to
whom witnesses were already there. He has his own
enmity with the accused. He says that he stood at north
western side of the house but did not go to the door of Brij
Raj Tiwari but in his statement he says he went to the door
C of Brij Raj Tiwari. He says that deceased went a little on
the western side after being injured and fell down there
near the road. This is nobody's case. He says that he did
not talk with the informant nor did he see him doing
anything.

D 13. The analysis made by the High Court does not suffer
from any infirmity. On the contrary, the trial Court's judgment
proceeded on surmises and conjectures and was based on
totally inappropriate appreciation of the evidence. Relevant
aspects were not considered and irrelevant aspects were
taken into account. Therefore, the High Court was justified in
E recording conviction.

14. The appeal is without merit and is dismissed.

R.P.

Appeal dismissed.