JAGDISH NARAIN AND ANR.

v.

STATE OF U.P.

MARCH 12, 1996

[DR. A.S. ANAND AND M.K. MUKHERJEE, JJ.]

Indian Penal Code, 1860 :

Ss. 148, 302/34, 302/149—Five persons accused of murder—Acquittal by trial court—Appeal—Two accused died pending appeal—High Court acquitting one of the accused and convicting remaining two under ss.148 and 302/149—Held, High Court not right in recording conviction under ss.148 and 302/149—Conviction u/s. 148 set aside—Conviction u/s.302/149 altered to one under s. 302/34.

Code of Criminal Procedure, 1973 :

Ss. 157, 161, 162, 379—Offence of murder—Site plan prepared by Investigating Officer—Place from where shots fired not shown in site plan—Held, investigation cannot be faulted on this ground, because investigating officer was not a witness to incident and had he shown the place after ascertaining from witnesses, it would have been hit by s.162.

Evidence Act, 1872 :

S.60—Site plan prepared by Investigating Officer—Contents of—Evidentiary value—Explainted.

Appellant No. 1, alongwith his two sons and two friends, one of them being appellant No. 2, was tried for rioting and murder of his step brother, the father of PW. 1. The prosecution case was that on the date of incident while PW. 1, his father and a servant (PW. 2) were carrying sugarcane in a bullock cart, on their way to the mill, the five accused armed with deadly weapons including guns waylaid them. Appellant No. 1 fired a shot at the father of PW. 1 who was following the cart on foot and was also carrying a gun. The victim fell down and on the exhortation of the two sons of appellant No. 1, appellant No. 2 fired a short hitting the victim. Thereafter the miscreants fled away along with the gum of the deceased. PW. 1 lodged the F.I.R. whereupon a case was registered and PW. 6 commenced the

investigation, which culminated in the trial of the five accused.

The trial court acquitted the accused holding inter alia that there were contradictions in the evidence of the eye witnesses and their statements recorded under s.161 Cr.P.C. and that the investigation was faulty since the investigating officer did not show in the site plan the place from where the shots were fired. The State filed an appeal before the High Court. Meanwhile two of the accused died. The High Court acquitted one of the remaining accused but reversed the acquittal of the appellants and convicted and sentenced them under ss.148 and 302 read with 149 CPC.

Aggrieved, the appellants filed the appeal.

Dismissing the appeal, this Court

HELD : 1. The High Court was right in holding that the prosecution succeeded in proving that owing to the two shots fired by the appellants, the victim met with his death; and that the lacuna as pointed out by the trial Court could not have in any way impaired the evidence of the eye witnesses nor could have it affected the prosecution case. The contradictions which prusuaded the trial Court to disbelievé the eye witnesses related to their omissions to make certain statements before the Investigating Officer, which they made before the Court. The omissions were so minor and insignificant that they did not amount to contrdictions at all.

[258-C; 257-G; 254-G-H; 255-A]

2.1. Both P.Ws. 1 and 2 were the most probable witnesses, as they were accompanying the deceased at the material time and inspite of a detailed searching cross-examination nothing could be elicited by the defence to discredit or contradict them. [258-B]

2.2. Besides, the F.I.R. that PW. 1 promptly lodged within half an hour of the incident, fully corroborates PW. 1. The evidence of the doctor who held autopsy and found two gunshot wounds on the person of the deceased also corroborates the evidence of the above two eye witnesses. [258-C]

3.1. The Investigating Officer was not present at the scene when the incident took place; and in the site plan had he even shown the place from which the shorts were allegedly fired after ascertaining the same from the eye witnesses, it could not have been admitted in evidence being hit by Section 162 Cr.P.C. [255-H; 256-C]

3.2. However, if in a given case the site plan is prepared by a draftsman - and not by the Investigating Officer - entries therein regarding the place from where shots were fired or other details derived from other witnesses would be admissible as corroborative evidence. [257-B-C]

Tori Singh v. *State of U.P.,* **AIR (1962) SC 399, relied on.**

4. The High Court, having acquitted one of the accused was not legally justified in convicting the appellants under Section 148 and 302/149 IPC as it was the positive case of the prosecution that only the five arraigned were the miscreants. Since the manner in which the incident took place clearly indicates that the appellants shared the common intention of committing the murder, they are liable for conviction for the murder with the aid of Section 34 IPC. Their conviction is altered to one under s.302/34 IPC, but the sentence of imprisonment for life is maintained. [258-D-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 489 of 1995.

From the Judgment and Order dated 16.12.94 of the Allahabad High Court in A. No. 2573 of 1980.

K. Janjani for the Appellants.

Anis Ahmed Khan and A.S. Pundir for the Respondents.

The Judgment of the Court was delivered by

M.K. MUKHERJEE, J. Jagdish Narain, the appellant No. 1, alongwith his two sons Avdhesh and Avinash and two friends Rameshwar Dayal, the appellant No. 2, and Surya Prakash was tried by the Additional Sessions Judge, Pilibhit, for rioting and murder of his step brother Jitendra Nath. The trial ended in an acquittal; and agrieved thereby the State preferred an appeal. During the pendency of the appeal Avdesh and Surya Prakash died and consequently their appeal abated. As regards others, the High Court affirmed the acquittal of Avinash but reversed that of the two appellants (the respondents therein) and convicted and sentenced them under Sections 148 and 302, read with Section 149 I.P.C. The above order of conviction and sentence is under challenge in this appeal preferred under Section 379 Cr.P.C.

Shorn of details the prosecution case is that on February 11, 1977 the deceased, his son Achal Kumar (P.W. 1) and his servant Devi Ram (P.W. 2) were carrying sugarcane in a bullock-cart from their village Mar to a mill in Bilsanda for getting the same weighed. While P.Ws. 1 and 2 were in the bullock cart with the latter driving it, the deceased was following the cart on foot. At or about 2 P.M. when the cart had, after crossing a culvert situated on the *kachha* road, reached near the field of one Ram Autar, the five accused persons came out from behind a heap of straws armed with deadly including guns. Then the appellant No. 1 fired a shot at Jitendra Nath felling him down. The gun which the deceased was carrying also fell down. On the exhortation of Avinash and Avdesh, the appellant No. 2 also fired a short hitting Jitendra Nath. Thereafter the miscreants fled away alongwith the gun of the deceased.

Achal Kumar (P.W. 1) then rushed to Bilsanda Police Station, which was at a distance of one mile, and lodged an information about the incident. On that information a case was registered against the accused persons and Inspector D.R. Thapalyal (P.W. 6) took up investigation. He went to the scene of occurrence accompanied by other police personnel and after holding inquest upon the dead body sent it for post-mortem examination. He prepared a site plan and seized some blood stained earth, two pellets and one pair of shoes from the site. On completion of investigation he submitted chargesheet against the accused persons and in due course the case was committed to the Court of Session.

The accused persons pleaded not guilty to the charges levelled against them and their defence was that they had been falsely implicated.

To sustain the charges levelled against the accused persons the prosecution relied upon the ocular accounts of Achal Kumar (P.W. 1) and Devi Ram (P.W. 2), who were allegedly in the cart, and Daya Ram (P.W. 3) who claimed that he was passing along the road at the material time. Besides, the prosecution examined the doctor, who held post-mortem examination upon the deceased, the Investigating Officer and some other formal witnesses. The reasons which weighed with the trial Court to disbelieve the evidence of the eye-witnesses and, for that matter the prosecution case, are as under :

(i) The testimonies of the eye witnesses stood contradicted by their earlier statements recorded under Section 161 Cr.P.C.;

(ii) Though, according to the eye witnesses, the deceased was attacked while going along the *sait* (road) his dead body was found in the field (of Ram Autar) and no explanation was offered by the prosecution to reconcile the anomaly;

(iii) Even though the investigating Officer admitted that he knew from the very beginning about the importance of the place from where the shots were fired he did not indicate that place in the site plan he prepared and such failure made the investigation faulty and suspicious;

(iv) No attempt was made by the Investigating Officer to ascertain to whom the pair of shoes found near the dead body belonged; and

(v) A number of documents were filed on behalf of the accused persons to show that the deceased had enmity with other persons also and, therefore, it could not be said that they were the only persons who were likely to commit the murder of Jitendra Nath, more so when he was armed with a gun.

In reversing the order of acquittal and passing the impugned order the High Court first reappraised the evidence in the light of the above findings and demonstrated that each of them was perverse. It then considered the evidence of the three eye witnesses to ascertain whether it could be safely relied upon to base a conviction. On such consideration the High Court found that PWs. 1 and 2 were the most probable and natural witnesses and that their evidence was creditworthy. The High Court, however, left the evidence of PW. 3 out of consideration as, according to it, he was not an independent witness. The High Court further found that the evidence of P.W. 1 stood fully corroborated by the FIR which was lodged within half an hour of the incident and that the evidence of both P.Ws. 1 and 2 stood corroborated by the medical evidence.

This being a statutory appeal we have, for ourselves, carefully porused the evidence adduced by the prosecution (no evidence was led by the defence) particularly that of P.W. 1 and 2 keeping in view the judgments of the learned Courts below; and we are constrained to say that none of the grounds canvassed by the trial court to acquit the appellants can be sustained. The contradictions which persuaded the trial Court to disbelieve the eye witnesses related to their omissions to make certain statements before the Investigating Officer, which they made before the Court. On

perusal thereof we find that the omissions were so minor and insignificant that they did not amount to contradictions at all. To eschew prolixity of this judgment we, however, refrain from detailing them except referring to one, to illustrate the entirely wrong approach of the trial Court in this regard. PW. 2 testified that while driving the cart he was sitting on the bundles of the sugarcane but in his statement recorded under Section 161 Cr.P.C. he did not state that he was so seated. Indeed, it is only for this minor omission that the trial Court found the evidence of PW. 2 wholly unreliable.

As regards the comment of the trial Court that the prosecution made no attempt to dispel the anomaly about the place where the deceased was attacked and his dead body was found, we are in complete agreement with the observations of the High Court that the above comment was the outcome of non consideration of the evidence. PW. 1 testified that while the cart was proceeding on the *kacha* road and it had reached the place where the road turned towards the east, his father moved on to the *pagdandi,* (hilly circuitours track) which passes through the field of Ram Autar. According to the evidence of P.W. 6, which remained uncontroverted, the dead body of Jitendra was found lying near the *pagdandi* and he held inquest there. The evidence of the prosecution witnesses thus clearly proves that Jitendra Nath met with his death at the place where his dead body was lying. The finding of the trial Court in this regard must therefore be said to be perverse.

In responding to the next criticism of the trial Court regarding the failure of the investigating Officer to indicate in the site plan prepared by him the spot wherefrom the shots were allegedly fired by the appellants and its resultant effect upon the investigation itself, the High Court observed that such failure did not detract from the truthfulness of the eye witnesses and only amounted to an omission on the part of the investigation Officer. In our opinion neither the criticism of the trial Court nor the reason ascribed by the High Court in its rebuttal can be legally sustained. While preparing a site plan an Investigating Police Officer can certainly record what he sees and observes, for that will be direct and substantive evidence being based on his personal knowledge; but as, he was not obviously present when the incident took place, he has to derive knowledge as to when, where and how it happened from persons who had seen the incident. When a witness testifies about what he heard from somebody else

it is ordinarily not admissible in evidence being hearsay, but if the person for whom he heard is examined to give direct evidence within the meaning of Section 60 of the Evidence Act, the former's evidence would be admissible to corroborate the latter in accordance with Section 157 Cr.P.C. However such a statement made to a Police Officer, when he is investigating into an offence in accordance with Chapter XII of the Code or Criminal Procedure cannot be used to even corroborate the maker thereof in view of the embargo in Section 162(1) Cr.P.C. appearing in that chapter and can be used only to contradict him (the maker) in accordance with the proviso thereof, except in those cases where sub-section (2) of the section applies. That necessarily means that if in the site plan PW. 6 had even shown the place from which the shots were allegedly fired after ascertaining the same from the eye witneses it could not have been admitted in evidence being hit by Section 162 Cr.P.C. The law on this subject has been succinctly laid down by a three Judge Bench this Court in *Tori Singh* v. *State of U.P.,* AIR (1962) SC 399. In that case it was contended on behalf of the appellant therein that if one looked at the sketch map, on which the place where the deceased was said to have been hit was marked, and compared it with the statements of the prosecution witnesses and the medical evidence, it would be extremely improbable for the injury which was received by the deceased to have been caused on that part of the body where it had been actually caused if the deceased was at the place marked on the map. In repelling the above contention this Court observed, *inter alia,* :

> ".....the mark on the sketch map was put by the Sub-inspector who was obviously not an eye-witness to the incident. He could only have put it there after taking the statements of the eye witnesses. The marking of the spot on the sketch map is really bringing on record the conclusion of the Sub-inspector on the basis of the statements made by the witnesses to him. This in our opinion would not be admissible in view of the provisions of S.162 of the Code of Criminal Procedure, for it is in effect nothing more than the statement of the Sub-Inspector that the eye witnesses told him that the deceased was at such and such place at the time when he was hit. *The sketch map would be admissible so far as it indicates all that the Sub-Inspector saw himself at the spot; but any mark put on the sketch-map based on the statements made by the witnesses*

to the Sub-Inspector would be inadmissible in view of the clear provisions of S.162 of the Code of Criminal Procedure as it will be no more than a statement made to the police during investigation."

(emphasis supplied)

While on this point, it will be pertinent to mention that if in a given case the site plan is prepared by a draftsman - and not by the Investigaing Officer - entries therein regarding the place from where shots were fired or other details derived from other witnesses would be admissible as corroborative evidence as has been observed by this Court in *Tori Singh's* case (supra) in the following passage :

"This Court had occasion to consider the admissibility of a plan drawn to scale by a draftsman in which after ascertaining from the witnesses where exactly the assailants and the victims stood at the time of the commission of offence, the draftsman put down the places in the map, in *Santa Singh* v. *State of Punjab,* AIR (1956) SC 526. *It was held that such a plan drawn to scale was admissible if the witnesses corroborated the statements of the draftman that they showed him the places and would not be hit by S.162 of the Code of Criminal Procedure."*

(emphasis supplied)

The trial Court ought not to have also made much out of the failure on the part of the Investigating Officer to find out to whom the pair of shoes found near the dead body belonged for the prosecution rested its case upon eye-witnesses and not circumstantial evidence. If the prosecution intended to prove the accusation levelled against the appellants by circumstantial evidence, then proof of the circumstance that the shoes belonged to one of them would certainly have been incriminating but when the prosecution rested its case upon the evidence of the eye witnesses that question was of no such moment. In any event, the lacunae as pointed out by the tiral Court could not have in any way impaired the evidence of the eye witnesses nor affected the prosecution case, as rightly observed by the High Court.

The last reason given by the trial Court to disbelieve the prosecution case in the context of the fact that the deceased had enmity with others is

absurd for such a plea would have been available to anyone who might have been arraigned for the murder. The High Court, was therefore fully justified in observing that the deceased might have enmity with others but the question as to who had committed the murder was to be answered by the Court on the basis of the evidence adduced.

Coming now to the evidence on record, we find that both PWs 1 and 2 were the most probable witnesses, as they were accompanying the deceased at the material time and that inspite of a detailed searching cross-examination nothing could be elicited by the defence to discredit or contradict them. Besides, we find the FIR that PW. 1 promptly lodged within half an hour of the incident, fully corroborates PW. 1. The evidence of the doctor (PW. 4), who held autopsy and found two gunshot wounds on the person of the deceased also corroborates the evidence of the above two eye witnesses. We are, therefore, inagreement with the High Court that the prosecution succeeded in proving that owing to the two shots fired by the appellants Jitendra Nath met with his death. The High Court, however, was not legally justified in convicting the appellants under Sections 148 and 149/302 IPC for consequent upon the order of acquittal recorded by it in favour of Avdhesh, Section 148 and 149 IPC could not have any manner of application - it being the positive case of the prosecution that only the five arraigned were the miscreants. Since, however, the manner in which the incident took place clearly incidates that the appellants shared the common intention of committing the murder of Jitendra Nath they are liable for conviction for the murder with the aid of Section 34 IPC.

On the conclusions as above we set aside the conviction and sentence of the appellants under Section 148 IPC; and alter their conviction under Section 302/149 to 302/34 IPC but maintain the sentence of imprisonment for life imposed for the former. With the above modifications the appeal is dismissed.

Appeal dismissed.