

CASE NO.:
Appeal (crl.) 29 of 1999

PETITIONER:
State of U.P.

RESPONDENT:
Kishan Chand & Ors.

DATE OF JUDGMENT: 20/08/2004

BENCH:
B.N. AGRAWAL & H.K. SEMA

JUDGMENT:
J U D G M E N T

SEMA, J.

Nine accused were put on trial before the Addl. Sessions Judge. During the pendency of the trial, one accused died, therefore, eight accused have faced the trial. At the end of the trial, the trial court acquitted accused nos. 6, 7, and 8 of all the charges. No appeal was preferred by the State against their acquittal. The five accused (respondents herein) namely Kishan Chand, Rama Shankar, Ram Chandra, Gauri Shankar and Chhotey Lal were convicted under various Sections of Law as follows:-

Accused Kishan Chand was sentenced to undergo life imprisonment under Sections 302/34 and 302/149 I.P.C. Six months R.I. under Section 323 I.P.C. One years R.I. under Section 148 I.P.C. and 5 years R.I. under Section 307 read with Section 149 I.P.C. and 5 years R.I.

Accused Rama Shankar was sentenced to undergo life imprisonment under Section 302 I.P.C. One year R.I. under Section 148 I.P.C. 5 years R.I. under Section 307/149 I.P.C. and 6 months R.I. under Section 323 read with 34 I.P.C.

Accused Ram Chandra son of Bala Sukh and Gauri Shanker were sentenced to undergo life imprisonment under Section 302 read with Section 34 I.P.C. and Section 302 read with Section 149 I.P.C. Six months R.I. under Section 323/34 I.P.C. One year R.I. under Section 149 and 5 years R.I. under Section 307 read with Section 149 I.P.C.

Accused Chhotey Lal was sentenced to undergo one year R.I. under Section 148 I.P.C. Life imprisonment under Section 302/149 I.P.C. and five years R.I. under Section 307/149 I.P.C. The sentences, however, were directed to run concurrently.

On appeal, being preferred by the accused persons, the High Court by the impugned order acquitted them of all the charges levelled against them. Hence, this appeal by special leave, has been preferred by the State of U.P.

Briefly stated the facts are as follows:-

The accused and the complainants are all residents of Harish Purwa, P.S. Sachendi District Kanpur. On 3.8.1974 at about 5.30 p.m. the accused formed an unlawful assembly in the dharmashala of Shridhar in village Hariram ka Purwa and in furtherance of common

object murdered Sheo Ram and Mool Chand and caused injuries to PW1- Shridhar and PW8 - Mizazi Lal. The first information report lodged by PW3-Ram Swarup disclosed that on the fateful day at about 5.30 p.m. Chhotey Lal (PW2) son of Tulsi was singing on the eve of Raksha Bandhan in the dharmashala of Shridhar. Ashok Chand, Mizazi Lal, Soney Lal Gupta, Ram Mohan, Mool Chand his son Ramoo and others were also there. In the meantime, accused Kishan Chand son of Hem Raj, Rama Shankar son of Chhotey Lal, Ram Chandra son of Sada Sukh, Gauri Shankar son of Hem Raj and Chhotey Lal armed with gun, country made pistols and hockey-sticks reached there. Immediately thereafter, accused Kishan Chand gave a hockey blow to Shridhar. Thereupon, the deceased Mool Chand asked him not to quarrel on the festival day. Accused Rama Shankar fired at him. Thereafter, accused Kishan Chand fired at Shridhar who fell down after sustaining injuries. Accused Ram Chandra was at the roof and instigated the accused to kill the informant and others. At his instigation accused Chhotey Lal, Kishan Chand, Rama Shankar, Gauri Shankar and Ram Chandra became more furious and started firing indiscriminately from their gun and country made pistols. In the process, Shridhar (PW-1) and Mizazi Lal (PW-8) had also received injuries. In the said incident, Sheo Ram and Mool Chand died on the spot.

In course of the trial, the prosecution relied upon the testimony of eyewitnesses PW1-Shridhar, PW2-Chhotey Lal, PW3-Ram Swarup and PW8-Mizazi Lal. Counsel for the State, contended that the Trial Court, was justified in placing reliance on the eye witnesses account of PWs 1, 2, 3 and 8 and the High Court was clearly in error in disbelieving the eyewitnesses account of prosecution witnesses resulting in acquittal of accused on the basis of perverse finding.

Per contra counsel for the accused-respondents would contend that the so-called eyewitnesses are interested witnesses. PW2-Chhotey Lal, PW3-Ram Swarup, being the brothers of the deceased, their testimony is not reliable and the High Court was justified in disbelieving their testimony. He would further contend that there was an enmity between the parties and the witnesses deposed falsely against the accused because of animosity. Counsels on both the sides have taken pain in taking us through the entire judgment of the High Court. To say the least, the High Court did not assign any reason much less ostensible reason for discarding the testimony of the eyewitnesses account.

The submission of the counsel for the accused that the testimony of PWs cannot be acted upon, as they are the interested witnesses is to be noted only to be rejected. By now, it is well-settled principle of law that animosity is a double-edged sword. It cuts both sides. It could be a ground for false implication and it could also be a ground for assault. Just because the witnesses are related to the deceased would be no ground to discard their testimony, if otherwise their testimony inspires confidence. In the given facts of the present case they are but natural witnesses. We have no reason to disbelieve their testimony. Similarly, being the relatives, it would be their endeavour to see that the real culprits are punished and normally they would not implicate wrong persons to the crime, so as to allow the real culprits to escape unpunished.

That apart PW1-Shridhar and PW-8 Mizazi Lal are both independent and injured witnesses. The testimony of an injured witness has its own relevance and efficacy. The fact that the witnesses sustained injuries at the time and place of occurrence lends support to their testimony that the witnesses were present during the occurrence. The injured witnesses were subjected to lengthy cross-examination but nothing could be elicited to discredit their testimony.

Counsel for the accused contended that the prosecution fails to establish which of the accused caused fatal injuries. This submission is misconceived. The convictions were recorded under Sections 302 with the aid of Section 34 and under Section 302 with the aid of Section 149. It is a well established principle of law that when the conviction is recorded with the aid of Section 149, relevant question to be examined by the court is whether the accused was a member of unlawful assembly and not whether he actually took active part in the crime or not. The Constitutional Bench of this Court in *Masalti Vs. State of U.P.*, 1964 (8) S.C.R. 133 at page 148 SCR held:-

"What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained along with the other members of the assembly the common object as defined by s.141, I.P.C. Section 142 provides that whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly. In other words, an assembly of five or more persons actuated by, and entertaining one or more of the common objects specified by the five clauses of s. 141, is an unlawful assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by s.141."

Further at page 149 SCR it is said:-

"In fact, s.149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by s.149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly."

Counsel for the respondents, strenuously urged that from the evidence of the prosecution witnesses accused Ram Chandra was at the roof and instigated the accused to finish the prosecution party and as such it cannot be said that the accused formed an unlawful assembly to perpetrate the crime. We are unable to countenance with this submission of the counsel. Firstly, an assembly, which was not unlawful assembly when it assembled, may subsequently become an unlawful assembly. Secondly, common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case. In the instant case, the prosecution evidence disclosed that it was a Raksha Bandan day when the singing was going on, the accused appeared at the scene with gun and country made pistols and hockey-sticks, attacked the prosecution party and started firing indiscriminately resulting in the death of Sheo Ram and Mool Chand. Deduced from the surrounding facts and circumstances of this case, it is clear that the accused did form an unlawful assembly and in furtherance of that common object of the unlawful assembly, crime has been perpetrated.

The next contention of the counsel for the respondents that the non-explanation of the injuries sustained by the accused caused

prejudice to the accused, also deserves to be rejected. The prosecution has explained that at the time of arrest the accused tried to flee and in that process sustained some injuries being beaten by the arresting party. The injuries sustained by the accused were simple in nature. This apart, it is well-settled principle of law that non-explanation of injuries sustained by the accused by the prosecution would not vitiate the trial, if the prosecution evidence against the accused is so strong on the basis of which alone the conviction can be recorded. As already noted, in the present case, out of four eyewitnesses two are independent and stamped witnesses.

There is yet another contention of the counsel for the respondents, which deserves outright rejection. Counsel would contend that after the reconstruction of the case record the statements made by the accused-respondents under Section 313 Cr.P.C. have not been properly considered by the Trial Court and prejudice thereby has been caused to the accused-respondents. We have gone through the judgment of the Trial Court which would show that the statements made by the accused under Section 313 have been quoted in verbatim and the same have been considered by the Trial Court in great detail. Before the High Court, it was not the case of the accused that the reconstruction of the record has not been done properly. Conversely, the High Court in the order dated 7.10.1994 has recorded the total satisfaction that the reconstructed record is proper.

In the premises aforesaid, we are clearly of the view, that the High Court fell in error in acquitting the accused resulting in grave miscarriage of justice. The impugned order of the High Court is, accordingly, set-aside. The conviction recorded by the Trial Court is hereby restored. The accused-respondents Kishan Chand, Rama Shankar, Ram Chandra, Gauri Shankar, and Chhotey Lal are directed to be taken into custody forthwith. Compliance report within three weeks. The appeal is, accordingly, allowed.