

CASE NO.:
Appeal (crl.) 382-386 of 2004

PETITIONER:
Umar Mohammad & Ors

RESPONDENT:
State of Rajasthan

DATE OF JUDGMENT: 12/12/2007

BENCH:
S.B. Sinha & Harjit Singh Bedi

JUDGMENT:
J U D G M E N T

CRIMINAL APPEAL NOS.382-386 OF 2004
WITH
CRIMINAL APPEAL NO.387 OF 2004
Jamallu son of Asheen
Versus
State of Rajasthan

\005 Appellant

\005 Respondent

S.B. SINHA, J.

1. Appellants were convicted for commission of offences under Sections 302/149, 323/149 and 148 of the Indian Penal Code, inter alia, for committing murder of Jharmal and Juhru and also causing hurt to Mubin on 26th October, 1991 at about 1.00 a.m.
2. The First Information Report in relation to the said incident was lodged at about 7.00 a.m. on the same day by Kannu son of Chhote Khan (brother of the deceased Jharmal and Jharu). The distance between the place of occurrence and the police station is said to be about six kilometers. The first informant had to walk to the police station for the purpose of lodging the First Information Report.
3. In the said First Information Report, it was alleged that when at about 1.00 a.m. on the previous night the deceased and injured were thrashing bazra, they were attacked by 12 persons, namely, Mohd. Ishaq, Sahid, Abdul Salam, Umar Mohd., Narangi, Liyakat Ali, Gernal, Jamalu, Alladdin, Rustam, Jamil, Mewan and Bilag.
It was furthermore alleged that Sahid and Gernal were carrying 12 Bore guns, Mohd. Ishaq Abdul and the rest of the accused were having lathis.
4. On exhortation given by Mohd. Ishaq ordering to shoot down Jharmal and his two brothers, Sahid and Gernal allegedly fired shots from their guns.
5. The informant ran away from the said place and climbed on a nearby hill. He cried for help. Jharmal and Mubin also cried for help. They ran towards a well situated nearby. Accused killed Jharmal and Juhru by hitting them on their heads with lathis and Tachia (a weapon like Farsa). Mubin was also assaulted on his head and other parts of the body. Presuming all the three brothers to be dead the accused ran away. Allegedly the wooden portion of the gun of Sahid fell down at the place of occurrence.
6. The motive for commission of the said offence is said to be that Majid had some dispute in respect of a house with Jharmal.
7. It was also alleged that the accused persons took away a sum of Rs.1950/- from the pocket of the 'kurta', Juhru had then been putting on.
8. The learned Sessions Judge, while holding the appellants guilty of commission of the said offences, acquitted Majid, Umrao, Akhe Singh, Nooru, Kehar, Risal from the charge of conspiracy to murder the deceased. Sahid Ahmad, Daud Khan, Mohd. Ishaq, Abdul Salam, Narangi, Namalu, Umar Mohd., Rustam, Alladin and Jamil were also acquitted of the charges levelled against them under Sections 307 and 307/149 IPC. The learned Trial Judge also acquitted Liyaqat from the charges levelled against him.

9. Charges were found to have been proved against Sahid Ahmad, Dau Khan, Mohd. Ishaq, Abdul Salam, Narangi, Jamalu, Umar Mohd., Rustam, Alladin and Jamil under Sections 148, 323/149, 302/149 IPC. Charges under Section 147 were also found to have been proved against Narangi, Jamalu, Umar Mohd., Rustam, Alladin and Jamil. They were sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.1000/- for commission of the offence under Section 302/149 IPC; one month's rigorous imprisonment under Section 323/149 IPC as also a fine of Rs.200/-. Narangi, Jamalu, Umar Mohd. Rustam, Alladeen and Jameel were also sentenced to undergo one year rigorous imprisonment and to pay a fine of Rs.500/- for commission of an offence under Section 148 IPC.

10. On appeals having been preferred by the accused, the High Court, while dismissing the appeals of Narangi, Jamalu, Umar Mohd. Rustam, Alladeen and Jamil, Sahid, Mohd., Ishaq and Abdul Salam, allowed the one preferred by Daud Khan.

11. Mr. Brijender Chahar, learned counsel appearing on behalf of the appellants, in support of this appeal, inter alia, would submit that all the prosecution witnesses upon whom reliance has been placed by the learned Sessions Judge as also the High Court, being interested witnesses, the judgment of sentence and conviction are not sustainable.

12. It was pointed out that the prosecution case being based on the alleged motive in regard to land dispute by and between Majid and the deceased for commission of the offence and the State having failed to prove the same, the impugned judgment cannot be sustained.

13. It was contended that the 'farsa' and 'guns' which were said to be the weapons of offence having not been recovered, the prosecution story should not be relied upon. The theory of criminal conspiracy having been discarded, it was urged, it would not be safe to uphold the judgment of conviction and sentence as against the appellants.

14. Mr. Ranbir Singh Yadav, learned counsel appearing on behalf of the appellant, Jamallu and others, also contended that the case of Jamallu being on the same footing as that of Daud Khan and the High Court having acquitted Daud Khan, there is absolutely no reason as to why Jamallu would not be similarly treated.

15. Mr. Navin Kumar Singh, learned counsel appearing on behalf of the respondent, however, supported the impugned judgment.

16. The incident, as noticed hereinbefore, took place at the dead of night. Two persons died and one was injured in the incident. The first informant went to Bhullu, PW-6, for getting the report written down. He immediately proceeded to the police station and got the FIR lodged. Twelve persons were named in the FIR.

17. Bhullu, PW-6, however, at a later stage disclosed that all the accused persons entered into a conspiracy for committing the murder. On the basis of the said statement, in all, eighteen persons were put to trial.

18. The Trial Judge acquitted eight of them. One of the accused persons, namely, Gernal has been absconding. One of them, Ishaq, is said to be dead. As noticed hereinbefore, the High Court also by reason of the impugned judgment, acquitted one other.

19. The rest eight accused are before us.

20. PW-1, Mubin was an injured witness. He was mercilessly beaten. He, although ultimately found to have suffered simple injuries, had fainted at the place of occurrence. Even when the first informant went to the police station to lodge the FIR, he was lying unconscious at the place of occurrence. Apart from Mubin, Kannu the first informant and Deena examined themselves as PW-4 and PW-8 in support of the prosecution case. Besides Mubin, they were also eye witnesses.

21. Autopsy on the body of the Jharmal and Juhru was conducted by Dr. Ram Swaroop Gupta who examined himself as PW-5. We may, at the outset, notice the external injuries found on the dead bodies :
"JUHRU (EX.p-14):-

1. Lacerated wound with # of scalp, over Rt. Pareito occipital area of scalp with its tributaries measuring 3"x1/3" x bone deep and ="x1/4"1/6"brain tissue over the

surface.

2. Incised wound 3"x1/3" line deep segietal sntume.

3. Incised would 2"x1/3"x bone deep just in front of and to left of injury No.2 over left parietal area, longitudinally;

4. Lacerated wound 3" x =" x bone deep, just to the left on parietal to injury No.3 over left parietal area of scalp.

5. Incised wound 1-="x1/4" x bone deep over middle of the sagital suture, longituadinally.

6. Incised wound 1" x <" x bone deep, obliquely over Rt. Parietal area of scalp near interior hair lime."

JHADMAL (EX.P-15)

1. Incised wound, 4"x1" x Brain deep with cutting of bone part of brain with its menings underneath it, over scalp of Rt. Parietal Eminence. A piece of bone 1"x1/2" is cut separated. Brain in lacerated and exposed on surface through the defect in the brain.

2. Incised would 3"x2,1/2"x bone deep over Rt. Parietal eminence. A flap of soft tissues is separated, 2,1/2" long, attached at its base.

3. Incised would 5"x1/4"x bone deep over occipital region behind and parallel to injury No.3.

4. Incised would 4.5"x1/4"x bone deep over occipital region behind and parallel to injury No.3

5. Incised would 3"x1/3" x1/8" over upper part of back of neck.

6. Incised would 1,1/2"x1/3" bone deep over Rt. Parietal Eminence.

7. Incised would 2"xx1/4"x bone deep over left parietal area in front of injury No.7.

8. Lacerated wound 4,1/4"x1/4" x Bone deep over Rt. Side of upper part of forehead, transversely.

9. Irregular lacerated wound 2"x1/4"x bone deep just left eye brown, transversely.

10. Incised wound, slanting downwards, 3, 1/2", =" x bone deep over face transversely from left ear to angle of lt. eye Left maxilla is fractured.

11. Incised wound 1" x <" whole thickness of

lt. angle of mouth.

12. Lacerated wound 1"x1/4"x1/4" behind left ear.

13. Gunshot wounds, two in number, over back of trunk, 9" apart, one just outside of angle of Lt. Scapula, another in the midline at L 2-3 spine level, each about 4mm x 4mm in size with charred margins and base involving only partial thickness of skin No. pallet is seen or felt in either of the wounds nor any pallet recovered on dissecting the wounds. Underlying tissues are healthy.

14. Incised wound 1" x1/4"x1/4" over back of upper third of lt. thigh.

15. Incised wound 1"x1/4"x1/4" over back of upper third of left 1" below injury No.14.

16. Incised wound 1"x1/4"x1/4" over back of middle third of left thigh.

17. Bruise 4"x1" over front of upper third of left arm."

22. Mubin (PW.1) also sustained injuries which as per injury report (Ex.P-13) are as under :-

"1. Bruise with abrasion 3"x 1" over Lt. Side of front of chest over 6th 7th ribs near costal margin.

2. Abrasion 1,1/2"x1/3" over back of middle third of Lt. Forearm.

3. Bruise <" x <" over ulnar aspect of wrist.

4. Bruise 1,1/2"x1" over Lt. Leg distal above lateral malleolus.

5. Bruise 4"x3/4" longitudinally over Rt. Shoulder.

6. Bruise 3" x3/4" antero posteriorly over Rt. Shoulder across injury No.5

7. Bruise 7"x3/4" over upper part of Rt. Scapula region and back of Rt. Shoulder.

8. Bruise 3"x3/4" over it Rt. Scapula area below and parallel to inj. No.7.

9. Bruise 9" x3/4" longitudinally over Lt. Side of back of chest just to Rt. of Mid. Line.

10. Bruise 4-1/2" x >" over lower ribs on Lt. Side of back of chest.

11. Bruise 1-1/2" x 1,1/4" just below and medial to inj. No.11.

12. Bruise 4"x3/4" transversely across lower most ribs over Rt. Blank.

13. Lacerated wound 2 \026 = cm x = cm x = cm over middle of scalp.
A lineat scare 5 cm x < cm transversely over antero lateral aspect of middle third of Rt forearm."

23. The injury report marked as Ex.P-13 in relation to Mubin (PW-1) revealed that he suffered as many as thirteen injuries. Injury No.13 was a lacerated wound, being 2.5 cm x = cm over middle of scalp. A linear; scare 5 cm x < cm transversely over antero lateral aspect of middle third of Rt. forearm.

24. We have referred to the injuries inflicted on the two deceased persons, as also injured Mubin, in details, only with a view to show that having regard to number of injuries inflicted on them, it may safely be assumed that a large number of persons took part therein.

25. Two gun shot injuries were suffered by Jharmal. Both the deceased had also suffered incised and lacerated wounds.

26. Both the courts below have arrived at a concurrent finding of fact that there was sufficient light for identification of the accused. The gun shot injuries suffered by Jharmal also establish that shot was fired from a close distance. Juhru also suffered a lacerated wound as also an incised wound in the pareito occipital area of scalp.

27. FIR was lodged within a short time. It appears from the trend of cross-examination that apart from the alleged land dispute with Majid, a dispute existed between the parties in regard to one woman, Rehmati by name. According to the prosecution, Rehmati the wife of Fulel, who was involved in a murder case, started living with the brother of PW-1. Appellant themselves suggested in cross-examination of the prosecution witnesses that there had been dispute between the family of Fulel and the family of the accused persons qua Rehmati.

28. It will bear repetition to state that PW-1 was an injured witness. He narrated the whole incident and described the manner in which it took place in some details. He was assaulted by lathis. He, although became unconscious, had sufficient time to notice the assaults caused by some of the appellants on Jharmal and Juhru. He had also disclosed the motive for commission of the said offence by the appellants.

29. PW-4 Kannu was the first informant. He, of course, in his statement before the police as also before the Court implicated a few persons who had not been named in the FIR but the same by itself cannot be a ground to discredit his testimony in its entirety. In his evidence, he gave in details the manner in which death was caused to Jharmal and Juhru and injuries to Mubin. PW-8 was Deena. According to this witness, he, at the time of occurrence, did not see Liyakat and Jamallu. We have noticed hereinbefore that the High Court had acquitted Liyakat. We may furthermore place on record that the counsel for the appellants other than Liyakat and Jamallu, brought to the notice of the said witnesses the statements made by him under Section 161 of the Code of Criminal Procedure where he had named Liyakat and Jamallu. An objection was taken thereto by the counsels for Liyakat and Jamallu but the same was over-ruled. It has been pointed out before us that according to the said witness exhortation was given by Md. Ishad that Jharmal should not be left alive, whereas according to PW-1, exhortation was directed against both Jharmal and Juhru. We do not think that the said contradiction is of such a nature that would discredit either his testimony or that of PW-1. The evidences of the three eye witnesses, namely, PW-1, PW-4 and PW-8 are almost identical. Some minor contradictions like the one which has been noticed by us heretofore had been pointed out but the said contradictions, in our opinion, are not such which would discredit their testimonies in their entirety.

30. Indisputably, immediately after the lodging of the FIR, the Investigating Officer came to the village. They went near the farm where the incident took place. Inquest report was also prepared without any loss of time. Even at that time, Mubin was unconscious. Inquest reports Exb. P-6 and P-7 were witnessed, inter alia, by PW-2 and PW-3. Presence of Kannu,

the informant, has also been testified by the said witnesses.

31. Oral testimonies of the said eye witnesses get corroborated by the medical evidence. Homicidal nature of death of Jharmal and Juhru and injuries suffered by Mubin are not in dispute. No discrepancy between the ocular evidence and medical evidence has also been brought to our notice. It may further be placed on record that although the evidence of PW-6 Gulu had not been relied upon by the learned Trial Judge in regard to his statement of hatching of a conspiracy by all the accused persons to commit the said offence as the same had not been disclosed in the FIR, there is no reason for us to disbelieve his statement to the effect that he has scribed the FIR at about 5.00 a.m. on 26.10.1996 and that at the request of PW-4 he wrote down the same.

32. Our attention has been drawn to the fact that Kannu did not disclose in the FIR that PW-1 was lying unconscious. It is now well settled that FIR need not be encyclopedic. It was a fact. It was found to be correct.

33. The defence had examined six witnesses. DW-1 Hussaina, DW-2 Ihsav, DW-3 Kallu, DW-4 Hafiz Mohd., and DW-5 Alladin, in their depositions alleged that some unknown persons had committed murder of Jharmal and Juhru and caused injuries on the person of Mubin. DW-6, who was a part of the investigating team, alleged that during his investigation it was found that Mohd. Ishaq, Daud and Salam did not commit the offence. Both the courts had categorically held that the testimonies of DW-1 to DW-5 were not reliable. They were not examined by the police. Their statements had not been recorded under Section 161 Code of Criminal Procedure. They never volunteered to give their statement. No suggestion has been thrown to the prosecution witnesses that they were present at the time of occurrence or they had the occasion to acquire any authentic knowledge in regard to the incident. So far as the statement of DW-6 is concerned, it was based on his opinion. Ishaq has died. Daud has already been acquitted by the High Court.

34. We also do not find any force in the submission of the learned counsel that the weapons of offences were not recovered. In any event, non-recovery of incriminating material from the accused cannot be a ground to exonerate them of the charges when the eye-witnesses examined by the prosecution are found to be trustworthy.

35. In *Krishna Mochi & Ors. v. State of Bihar* [(2002) 6 SCC 81], this Court held :

"It has been then submitted on behalf of the appellants that nothing incriminating could be recovered from them, which goes to show that they had no complicity with the crime. In my view, recovery of no incriminating material from the accused cannot alone be taken as a ground to exonerate them from the charges, more so when their participation in the crime is unfolded in ocular account of the occurrence given by the witnesses, whose evidence has been found by me to be unimpeachable."

36. Furthermore, as all the appellants before us were named in the FIR, it was also not necessary to hold a test identification parade.

37. We are, however, of the opinion that in view of the fact that Daud had been given the benefit of doubt, as Jummal stands on the same footing, he is also entitled to similar benefit and should, thus, be accorded benefit of doubt.

38. Before parting, however, we may notice that a contention has been raised by the learned counsel for the appellant that PW-1 who was examined in Court on 5.7.1994 purported to have filed an application of 1.5.1995 stating that five accused persons named therein were innocent. An application filed by him purported to be under Section 311 of the Code of Criminal Procedure was rejected by the learned Trial Judge by order dated 13.5.1995. A revision petition was filed thereagainst and the High Court also rejected the said contention. It is not a case where *stricto sensu* the provisions of Section 311 of the Code of Criminal Procedure could have been invoked. The very fact that such an application was got filed by PW-1

nine months after his deposition is itself pointer to the fact that he had been won over. It is absurd to contend that he, after a period of four years and that too after his examination-in-chief and cross-examination was complete, would file an application on his own will and volition. The said application was, therefore, rightly dismissed.

39. We, therefore, dismiss Criminal appeal Nos.382-386 of 2004 [Umar Mohammad & Ors. v. State of Rajasthan] and allow Criminal Appeal No.387 of 2004 [Jamallu son of Asheen v. State of Rajasthan]. If Jamallu is in custody, he shall be released forthwith unless wanted in connection with any other case.

JUDIS