

CASE NO.:

Appeal (crl.) 658 of 2000

Appeal (crl.) 787 of 2000

PETITIONER:

Mohar & Another

RESPONDENT:

State of U.P.

DATE OF JUDGMENT: 17/09/2002

BENCH:

DORAISWAMY RAJU & H.K. SEMA.

JUDGMENT:

J U D G M E N T

SEMA, J

These two appeals arise out of a common judgment and order passed by the High Court of Judicature at Allahabad dated 15th May, 2000 in Criminal Appeal No. 1659 of 1979 and Government Appeal No. 2819 of 1979. Criminal Appeal No. 1659 of 1979 had been preferred by Baljore (the appellant before us in Criminal Appeal No. 787/2002), who was convicted under Section 302 IPC and sentenced to life imprisonment by an order dated 1st May, 1979 passed by the Vth Additional Sessions Judge, Azamgarh, in Sessions Trial No. 533 of 1977. Government Appeal No. 2819 of 1979 had been preferred by the State of U.P. against the acquittal judgment by the Trial Court acquitting Mohar, Tikori and Tapsi (Mohar and Tikori are appellants before us in Criminal Appeal No. 658 of 2000) for the offences punishable under Sections 302, 324 and 323 read with Section 34 IPC. By the impugned judgment the High Court, after examining the evidence on record, dismissed Criminal appeal No. 1659 of 1979 preferred by Baljore and he was convicted and sentenced to imprisonment for life under Section 302 read with Section 34 instead of Section 302 IPC simpliciter, as recorded by the Trial Court. The High Court also allowed the Government Appeal No. 2819 of 1979 by reversing the acquittal of accused Mohar, Tikori and Tapsi, as recorded by the learned trial Judge and convicted each of them under Sections 302, 323 read with Section 34 IPC and sentenced them to undergo imprisonment for life and RI for a period of one year under Section 323 read with Section 34 IPC. The substantive part of sentences were directed to run concurrently. It appears that during the pendency of appeal accused Tapsi expired and the appeal preferred by him stood abated. Now only the appellants Mohar and Tikori (in Criminal Appeal No. 658/2000) are before us.

Both the accused and the complainants are residents of village Ultahawa Dewara, P.S. Maharajganj, District Azamgarh. Ramraj P.W.-1 and deceased Ram Awadh were also residents of the said village. Towards the north of the houses of Ram Raj and Ram Awadh, there was an agricultural field of accused - Baljore. There was also an agricultural field of deceased Ram Awadh near by. It is stated that in the year 1977 peas crop was existing in the field of Ram Awadh and wheat crop was existing in the field of Baljore.

The murder of deceased Ram Awadh and Hansraj is a sequel to the quarrel between Km. Kamli, daughter of deceased Ram Awadh and Tufania, son of accused Baljore on 29.1.1977 while they were picking akri and collecting grass adjoining their fields. It is stated that the quarrel between the two children was pacified by Balli (PW-3) and the children retired to their respective houses. When Ram Raj (PW-1) and his brother deceased Ram Awadh were present in front of their houses and Jagarjit

(Jagdish)PW-4 son of deceased Ram Awadh was milching cow in front of his door, it is said that accused Tapsi armed with lathi, Baljore, Mohar and Tikori armed with spears appeared in front of the house of Ram Raj and on being exhorted by accused Tapsi (since expired)) Baljore attacked deceased Ram Awadh with spear, accused Tapsi attacked Jagarjit(Jagdish) with lathi. On arrival of deceased Hansraj accused Tikori and Mohar attacked Hansraj with spears. Thereafter, the said accused started causing injuries on the deceased Ram Awadh and deceased Hansraj with their respective weapons. Jagarjit (PW-4) and Ram Awadh (deceased) tried to save themselves by plying Hasuwa (sickle) and lathi respectively. It is stated that the deceased Ram Awadh sustained injuries inflicted by spear caused by Baljore and deceased Hansraj sustained injuries caused by Mohar. Jagarjit (PW-4) sustained lathi injuries. On an alarm being raised by Ramraj (PW-1) and injured persons, Vibhuti (PW-2), Balli (PW-3) and Ayodhya came to the spot and witnessed the occurrence. After the incident, both the injured Ram Awadh and Hansraj were taken to Police Station, Maharajganj, at a distance of about five miles from the place of occurrence, and Ram Raj (PW-1) lodged the First Information Report at about 8.50 p.m. Head Constable, Yadunandan Singh (P.W.6) prepared the First Information Report (Ex.Ka-1) and registered the case vide extract G.D. (Ext. Ka-2) under Sections 323, 324 and 307 IPC.

Accused Baljore also lodged written first information of the incident at the Police Station and PW-6 Head Constable Yadunandan Singh prepared the FIR (Ex.Ka-17).

On 30.1.1977, injured Ram Awadh succumbed to his injuries at P.H.C. Maharajganj and on information being received of the death of Ram Awadh, Head Constable Yadunandan Singh, made entries in the General Diary and converted the offence from Section 307 IPC to 302 IPC. Sarvdeo Singh (PW-7), the Investigating Officer visited the hospital and prepared panchnama (Ex.Ka-6). Thereafter, constable Suresh Prasad (PW-9) took the dead body of Ram Awadh to Azamgarh and on the same day at about 4.00 p.m. Dr. O.P. Khattri PW-11, Medical Officer District Hospital, Azamgarh, conducted post mortem and found the following injuries on his person :

"ANTE MORTEM INJURIES

1. Abrasion cm x cm on the right side nose middle.
2. A stitched wound 2.5 cm long with one stitch on the left of chest lower part 22 cm from anterior axillary fold.

ON INTERNAL EXAMINATION

Wall-injuries distended under ante-mortem injuries.

Pleura punctured on left side as described by ante-mortem injuries.

Diaphragm on the left side is punctured underneath injury No.2

Paritoneum punctured below injury No.2

Cavity contains about one pint blood material with food material.

Contents, wall perforated (1" x " x cavity deep) 5" from the pylorus.

Stomach contains digested material about 4 oz.

The deceased was average built. Rigor mortis was present on the dead body. In the opinion of the doctor the injury No.2 was caused by pointed sharp edged weapon like spear. The injury was sufficient to cause death in ordinary course of nature. The death occurred as a result

of shock and hemorrhage due to said injuries. The doctor prepared post-mortem report Ext. Ka-15"

As noticed above accused-Baljore had also filed a cross complaint and he also sustained injuries. On examination by Dr.V.Pandey (PW-10), the accused sustained the following injuries on his person:

1. Punctured Wound 2/10" x 1/10" x 1/10" at the back of left little finger, 1.1/2" below the top of the same finger.
2. Contusion with swelling 2.1/2" x 2", 8" below the left elbow, on the left fore-arm, lateral aspect.
3. Contusion with swelling 2.1/2" x 1.1/2" on the right upper and outer surface 2.1/2" above the right elbow joint.
4. Complaint of pain on the right knee joint.
5. Punctured wound 2/10" x 2/10" on the right of the back of chest 6.1/2" from the right nipple. Wound was not bleeding. "

It is also noticed that the counter complaint lodged by accused-Baljore was found to be false by the Trial Court as the First Report lodged by accused Baljore, on 29.1.1977, was stated to be oral. Complaint by the accused was disproved by Ex.Ka-17. It may be noticed that in Exh. Ka-17, the complainant did not mention the place of incident. In the subsequent F.I.R. , in April, 1977, the accused stated that the incident had taken place in his wheat field. The learned trial court disbelieved the defence put up by the accused on the basis of subsequent FIR dated 7.4.1977 (Ex. Ka-2), filed by Baljore. The Trial Court found that the said application had been filed after a lapse of two months of the incident which was highly belated and the allegation made therein was highly improbable and well an after-thought to set up the plea of right of private defence.

On appreciation of the evidence the Trial Court acquitted the appellants Mohar and Tikori by assigning the following reasons:-

- (a) In the evidence of Ramraj (PW-1) and Balli (PW-3) the presence of one Jagdish PW-4 at the place of occurrence is mentioned but the name of Jagarjit does not find place in the FIR.
- (b) Vibhuti (PW-2) explained that Jagdish has his alias(names) as Jagjeet and Jagarjeet, but this statement was not supported by Ramraj (PW-1).
- (c) Ramraj (PW-1), Balli (PW-3) and Jagdish (PW-4) gave different versions regarding colour of cow which Jagdish PW-4 was said to have been milching at the time of occurrence.
- (d) Jagdish (PW-4) stated that the prosecution party plied sickle in order to save themselves but this fact has not been mentioned in the FIR and that the punctured wounds of the accused Baljore and Tapsi could not have been caused by sickle.
- (e) The injuries sustained by Jagdish (PW-4) were not examined on the same day but the next day and the doctor opined that his injuries could be self - inflicted.

Counsel for the appellants strenuously urged that the appellants have acted in a right of private defence and that for the reasoning as noticed above, the Trial Court has rightly recorded the acquittal of the two appellants but the High Court was in error in reversing the acquittal of the accused on appeal.

We will now proceed to examine the evidence on record. According to the prosecution story Jagdish(PW-4) alias Jagarjit was at the place of incident milching cow. In FIR Ramraj (PW-1) stated that at the time of occurrence, Jagarjit nephew of PW-1 was milching cow at the door of the house. The learned trial court disbelieved the presence of Jagarjit at the place of occurrence as in the cross examination PW 1 stated that PW-4 is also known as Jagdish alias Jagjit. It is to be noticed that PW-4 Jagdish has received injuries on his body in the same incident.

The testimony of an injured witness has its own efficacy and relevancy. The fact that the witness sustained injuries on his body would show that he was present at the place of occurrence and had seen the occurrence by himself. Convincing evidence would require to discredit an injured witness. Similarly, every discrepancy in the statement of witness cannot be treated as fatal. The discrepancy which do not affect the prosecution case materially cannot create any infirmity. In the instant case the discrepancy in the name of PW-4 appearing in the FIR and the cross examination of PW-1 has been amply clarified. In cross examination PW-1 had clarified that his brother - Ram Awadh had three sons: (1) Jagdish PW-4 (2) Jagarnath and (3) Suresh. This witness, however, stated that Jagarjit had only one name. PW-2 - Vibhuti, however, stated that at the time of occurrence the son of Ram Awadh Jagjit @ Jagarjit was milching cow and he was also called as Jagdish. Balli (PW-3) mentioned his name as Jagjit and Jagdish. PW-4 also gave his name as Jagdish.

In the injury report he has also given his name as Jagdish. It is noted that PW-4 has been given different names as Jagdish, Jagarjit and Jagjit but it is not disputed that he is the son of deceased Ram Awadh. Calling PW-4 as Jagarjit, Jagjit and Jagdish leads to only one conclusion that he is the son of deceased Ram Awadh. It is the specific case of the prosecution that son of deceased Ram Awadh and the nephew of Ramraj (PW-1) was milching cow near the door of the house at the time of occurrence. It is nobody's case that PW-4 Jagdish was not the son of deceased Ram Awadh. It is a common knowledge that in the village one name can be called by different nicknames and by different pronunciations and solely on the ground that the name of PW-4 appeared differently in the FIR and during the prosecution evidence, his presence at the place of occurrence cannot be disputed, more so, because he is the one who received injuries on his body as noticed above. The other reason assigned by the Trial Court, disbelieving the presence of PW-4 at the place of occurrence, was the colour of the cow said to have been milching by PW-4. PW-1 Ramraj stated that the colour of cow was white, Vibhuti - PW-2 stated that the colour was 'dhawar' and Balli - PW-3 however, stated its colour as 'sokan'. The different versions of colour of the cow assigned by PWs cannot be a ground to throw away the presence of PW-4 on the spot because from the evidence of PWs 1-3, the factum of PW-4 milching cow at the place and time of occurrence has been clearly established. In such a melee, witnesses may not be mindful of the colour of the cow.

The other ground, on which the learned Trial Court disbelieved the statement of PW-4, is the injuries sustained by the appellant Baljore. In the prosecution evidence it is stated that PW-4 Jagdish plied sickle in his defence. Admittedly accused Baljore and Tapsi (since dead) sustained injuries and also the deceased Ram Awadh, Hansraj and Jagdish (PW-4). Accused Baljore was medically examined by PW-10 Dr. V.P.Pandey and found five injuries on his body, as noticed earlier. The Doctor opined that all the injuries on Baljore were simple. Injury Nos. 1 and 5 were caused by pointed sharp edged weapon and rest by blunt weapon. Counsel for the appellants submits that sickle is not a pointed sharp edged weapon and such injuries cannot be caused by sickle and therefore ocular evidence is contrary to the medical evidence and the evidence of prosecution cannot be relied upon. We are not persuaded to accept the contention made by the learned counsel for the appellants, firstly because whether such injuries could be caused by sickle or not will depend upon the shape and size of the sickle and secondly, because Dr.Pandey PW-10 in his cross examination has clearly

stated that injury Nos. 1 and 5 of accused Baljore could be caused by sickle. Next it is contended by the learned counsel that Jagdish PW-4 admittedly received injuries on 29.1.1977 but he was examined on 30.1.1977 and the injury said to have been sustained by PW-4 is manufactured, apart from, according to the evidence of PW-10 such injury could be self inflicted. Such contention is far-fetched and does not appeal to us at all and deserves outright rejection.

FIR was lodged on 29.1.1977 itself and it is mentioned in the FIR that Tapsi attacked Jagarjit with lathi. It is noticed that FIR was lodged with no loss of time and, therefore, it cannot be said that since injured PW-4 was examined on 30.1.1977, it is manufactured by the prosecution subsequently. The High Court, on re-assessment of the entire evidence, has come to the conclusion that the presence of PW-4, at the place of incident is clearly established. The whole case, as already noticed, set up by the accused side, was rejected by the trial court as highly improbable and the said finding was confirmed by the High Court. Both the Trial Court and the High Court also found that the accused party was the aggressor. The High Court, also on re-appreciation of evidence, convicted Mohar and Tikori. It may be noticed that while acquitting the accused Tikori, the Trial Court was of the view that P.W.-1 Ram Raj has not mentioned Tikori in his examination-in-chief, instead he mentioned one Kishori. However, P.W.-1, in his cross-examination denied the suggestion that he had not mentioned the name of Tikori in the FIR. He has also denied the suggestion that the name of the accused Tikori was subsequently added. The other ocular evidence of P.Ws., namely, Vibhuti PW-2, Balli PW-3 and Jagdish PW-4 have also specifically stated the name of accused - Tikori and they have not named any accused as Kishori. This apart, in the FIR, PW-1 Ram Raj has specifically stated Tikori as one of the accused. So also the ocular evidence of P.Ws. 1, 2, 3 and 4 stated the presence of accused persons at the spot with arms and participation of accused Mohar in causing spear injuries to deceased Hansraj. The benefit of doubt rendered by the Trial Court, in respect of accused Mohar, Tikori and Tapsi (since deceased) runs straight to the teeth of ocular evidence. The High Court on appreciation of ocular evidence of P.Ws. 1, 2, 3 & 4 and materials on record has rightly come to the conclusion that the prosecution has been able to prove the presence and participation of the accused Mohar, Tikori and Tapsi (since deceased) beyond reasonable doubt. The Trial Court acquitted them on the benefit of doubt on tenuous ground.

On perusal of the evidence and materials on record, we have no reason to take a contrary view than the view taken by the High Court. On right of private defence put up by the accused, as already noticed, the trial court on appreciation of the evidence particularly after considering Ext.K-17; FIR lodged on 29.1.1977; Ex. Kha-2 and FIR filed on 7.4.1977, has come to the conclusion that occurrence originated in front of the house of deceased Ram Awadh and found that the accused party was the aggressor and the prosecution witnesses acted in self defence. With regard to Criminal Appeal No. 787 of 2000, preferred by Baljore, learned counsel for the appellant fairly submits that there is concurrent finding of facts. The only contention of the counsel is that there is no intention on the part of the accused Baljore to cause the death of the deceased and he submits that the conviction of the appellant under Section 302 IPC may be converted to the one under Section 304 Part I. On perusal of the evidence on record, we are of the view that this concession is not available to the appellant. For the aforesaid reasons these appeals are devoid of merit and they are, accordingly, dismissed.