

CASE NO.:
Appeal (crl.) 619 of 2000

PETITIONER:
LAKSHMI & ORS.

Vs.

RESPONDENT:
STATE OF U.P.

DATE OF JUDGMENT: 29/08/2002

BENCH:
Y.K.Sabharwal & H.K. Sema.

JUDGMENT:

Y.K. Sabharwal, J.

The first information report (FIR) was recorded on the statement of Sitaram father of deceased Ratan and Uncle of deceased Ramesh. Therein the names of accused Roshan and his four sons Lakshmi, Brahma, Kishan Chand and Shyam Sunder are mentioned. The 6th accused mentioned in the FIR is by description viz. brother-in-law of Ishwar Chand.

The FIR, inter alia, records that Ishwar Chand of the same village as the informant had been murdered. The murder had taken place in different village, namely, Sondha, Police Station Modi Nagar, District Ghaziabad. Deceased Ratan, Moolchand who is brother of Sitaram and other men accompanied Brahma and Roshan to bring back the body of Ishwar. Ishwar was son of Roshan. After the body of Ishwar had been brought back to the village, when the villagers asked Roshan and his sons to perform the funeral rights of Ishwar, they said that it would be performed the next day in the morning. Brahma told Ratan that along with the body of Ishwar, they would also burn the bodies of his murderer. On this, Ratan told Brahma that first perform the ceremony of Ishwar. Next morning, Brahma and Lakshmi called Ratan and Ramesh, took them into confidence and asked them to get ready for funeral ceremony and to carry their revolver with them and also told them that they were also doing so as they were apprehending some danger. Sitaram, Moolchand, Ratan, Ramesh and other villagers reached the cremation ground to attend the funeral of Ishwar. The funeral pyre was prepared and fire was ignited by Shyam Sunder and the body started burning. At this stage, when it was about 8.30 a.m., Brahma asked Ratan for his revolver which Ratan refused to give. Roshan and 'sala' (brother-in-law) of Ishwar caught hold of Ratan; Brahma fired with his rifle on the head of Ratan and Lakshmi fired Ratan with the country-made pistol; meantime Kishan Chand and Shyam Sunder fired at Ramesh; there was pandemonium; all started screaming and shouting; Lakshmi removed revolver of Ratan. Sitaram told him that these persons had always helped him and that is how he was repaying on which Brahma said that Ratan had got Ishwar murdered and they have taken revenge. Further, it records that all these people took the dead bodies of Ratan and Ramesh and put the said bodies on the pyre of Ishwar and these bodies also started burning.

After the investigation, 8 persons were put to trial for offences under Section 147, 148, 302, 149 and 201 IPC. Besides the aforesaid five named persons and Dharamvir brother-in-law of Ishwar, two other persons who were put to trial were accused No.7 Shatrughan and accused No.8 Baleshwar.

Trial Court acquitted Shatrughan and Baleshwar. The remaining six were convicted of the offences. It was held that the prosecution had established that the said six accused had formed an unlawful assembly with the common object of committing murders of Ratan and Ramesh; while Roshan and Dharamvir had no arms, the remaining four were armed with deadly weapons gun and pistols; the murder was committed in the funeral ground with a view to take revenge by burning their dead bodies along with the dead body of Ishwar as accused thought that Ratan and Ramesh were responsible for committing murder of Ishwar. For offence under Section 302 read with Section 149 IPC, imprisonment for life was imposed on all the six besides other sentences for offences on which they were found guilty including rigorous imprisonment for three years for offence under Section 201 read with Section 149 IPC.

Three criminal appeals and one criminal revision were preferred before the High Court challenging the judgment and order of the trial court. One appeal was filed by six accused challenging their conviction and sentence. Two appeals were filed by the State in one appeal acquittal of Shatrughan and Baleshwar was questioned and in the other the State prayed for enhancement of imprisonment for life imposed on Brahma on the ground that he had committed murder while undergoing life imprisonment and, therefore, death penalty should have been imposed on him. Criminal revision was filed by the complainant praying for the enhancement of sentence of the six accused persons.

The aforementioned appeals and revision petitions were disposed of by a common judgment and order of the High Court. Both the appeals of the State and criminal revision were dismissed. The criminal appeal filed by the accused persons was partly allowed. The conviction and sentence of Dharamvir was set aside. The conviction and sentence of Roshan for offence other than that under Section 201/149 was set aside. The conviction of Roshan for offence under Section 201/149 was converted to one under Section 201 IPC and sentence of three years imposed on him by the trial court in respect of Section 201/149 IPC was confirmed. Conviction of other accused persons, namely, Brahma, Lakshmi, Shyam Sunder and Kishan Chand was in substance confirmed with the only modification that their conviction under Sections 302/149 and 201/149 was converted to one under Section 302 and Section 201 IPC and sentences imposed by the trial court were maintained. They were, however, acquitted of charge under Section 148 IPC.

In these appeals, the judgment and order of the High Court has been challenged. Criminal appeal No.619/2000 has been preferred by Lakshmi, Shyam Sunder and Kishan Chand challenging their conviction and consequent sentence by the trial court as confirmed by the High Court in the manner aforesaid. Criminal Appeal No.620/2000 has been filed by Roshan challenging his conviction and sentence for offence under Section 201. Special Leave Petitions filed by the State challenging the judgment of High Court confirming the acquittal of Shatrughan and Baleshwar and also the dismissal of the other criminal appeals that had been filed by the State in the High Court seeking enhancement of sentence of Brahma have already been dismissed. The State has, however, been granted leave only in respect of its challenge to the acquittal of Roshan and Dharamvir (Criminal Appeal Nos.944-45/2000).

We have heard Mr. P.P. Malhotra, in support of Criminal Appeal No.619/2000, Mr. R.K. Shukla in support of Criminal Appeal No.620/2000, Mr. Praveen Swarup for State in all the appeals, Mr. R.K. Shukla and D.K.

Garg for respondents in State appeals and Mr. O.P. Sharma for the complainant. Mr. Malhotra, on instructions, stated that Brahma died after the decision of the appeals by the High Court.

We have with the assistance of learned counsel perused the relevant documents and the testimony of the witnesses. The conviction of the accused persons is based on the testimony of eye-witnesses PW1 Sitaram, PW2 Moolchand and PW5 Babu who have all deposed being present at the cremation ground when Ratan and Ramesh were shot and thereafter thrown on the pyre of Ishwar. PW1 is father of Ratan. PW2 is father of deceased Ramesh. PW1 and PW2 are brothers. PW5 is resident of the same village. PW3, Smt. Usha is wife of Ratan Lal and is said to have reached the cremation ground soon after the incident. She has not been believed by the trial court as also by the High Court. Her presence at the cremation ground as claimed was doubted and on that basis, Shatrughan and Baleshwar were acquitted in absence of any evidence to connect them with other accused. We are also not placing any reliance on Smt. Usha.

The incident took place at 8.30 a.m. The FIR on the statement of PW1 was recorded at 10 a.m. The FIR named six persons in the manner earlier noticed.

Mr. Malhotra contended that the prosecution has failed to prove its case beyond reasonable doubt. Learned counsel points out that despite the fact that according to the case of the prosecution four fire arms were used for shooting Ratan and Ramesh, neither of the weapon was recovered nor the weapon which was allegedly removed from Ratan and said to have been taken away by the accused was recovered nor any bullet or pallet was recovered. The contention that has been more strenuously put forth by the learned counsel is that the two bodies have not been identified and also that their cause of death could not be ascertained. Mr. Malhotra contends that in absence thereof, the conviction could not be maintained.

We have perused the two post mortem examination reports one in respect of Ramesh and the other in respect of Ratan. Both bodies had been extensively burnt. They were burning for about two hours before extraction from the burning pyre of Ishwar. The report in respect of Ramesh reads as under :

"The whole body except to external charred and burnt except the middle part of the back. Both the upper extremities are absent at the level of the shoulder Jts. The bones of shoulder and both the clavicles are visible and burnt. Both the lower extremities are absent at the level of lines r 2/3. The bones exposed in it are burnt. Face and scalp is burnt. The scalp line is visible. Ear, Nostrils, Eyes are not burnt. Mouth is closed and differed. The abdomen Cavity is lapsed and burnt, intestine and liver are visible."

The report in respect of Ratan Lal reads as under :

"The whole body is externally burnt and charred upper of the scull is absent. Cr. Ear is lying burnt. Ear, nose & Eyes are burnt, Mouth Y 2 open and in upper lateral. In lower to liver left lateral & crnisseth are visible. Both the upper extreentitus are absent at level of just below the elbow jt. and the both visible in it are burnt. Both lever extremities are absent at the level of the lower Y 2 of both the thighs. The bones visible in it are burnt. The thorasic & abdomal cavity is exposed non-existent. The vice are fully in it which are burnt."

As the bodies were extensively charred and burnt, the definite cause of death could not be ascertained. In respect of Ramesh, one gun shot wound was stated to be visible. The post mortem report in respect of Ratan does not state anything about any gun shot injury.

Regarding the identification of the two bodies, we perused Exhibit K-2 prepared after the bodies from burning pyre were taken out as aforesaid. K-2 notices that the bodies have been taken out by putting water. This document mentions that the bodies had been badly burnt and had no sign of identification except one was of heavy built up and other was of lightweight. Ratan was identified by his wife and Ramesh by his father. The theory that Ratan was wearing a muffler and could be identified on that basis has not been believed by the trial court and the High Court. We do not propose to take a different view of that aspect. Under these circumstances, it was strenuously contended that in view of this position of the bodies as is also clear from the post mortem reports, there was no proper, valid and legal identification and this discrepancy is fatal to the case of the prosecution coupled with absence of proof of cause of death.

Referring to Exhibits K-5 and K-16, it was also sought to be contended that although PW6 Constable Natha Singh took the bodies from Police Station at 6.30 p.m. for taking the bodies to the doctor for post mortem reports, but the same were delivered for the post mortem at about 12 noon. It was also pointed out that although PW1 was said to be present at the time of the preparation of inquest documents, but he was not a witness to the said documents which makes his presence at the time of the preparation of the documents doubtful. Learned counsel further pointed out that PW5 deposed that he only saw accused Brahma carrying the weapon and none else and as per aforesaid post mortem reports, there was only one injury of gun and, thus, it is possible that only Brahma had committed the offence and none else but the entire family has been implicated. Some fault was sought to be found in the preparation of the documents of investigation by the Police pointing out that the documents were prepared in pencil and that in some documents the first accused mentioned was Kishan Chand whereas in other documents other accused was mentioned and on that basis investigation was challenged as tainted.

Undoubtedly, the identification of the body, cause of death and recovery of weapon with which injury may have been inflicted on the deceased are some of the important factors to be established by the prosecution in an ordinary given case to bring home the charge of offence under Section 302 IPC. This, however, is not an inflexible rule. It cannot be held as a general and broad proposition of law that where these aspects are not established, it would be fatal to the case of the prosecution and in all cases and eventualities, it ought to result in the acquittal of those who may be charged with the offence of murder. It would depend on the facts and circumstances of each case. A charge of murder may stand established against an accused even in absence of identification of body and cause of the death.

The present case falls under this latter category. We would assume in favour of the accused persons that the prosecution had failed to conclusively prove as to which was the body of deceased Ratan and which was that of Ramesh. The trial court and the High Court, as earlier noticed, have disbelieved PW3 Usha wife of Ratan. The theory of his identification from muffler has not been accepted. It is also possible that the Police or the complainant thinking that identification of the dead bodies would be one of the important aspects to be established may have introduced the theory of muffler. The mere fact that in this regard, the case of the prosecution is not believed by itself does not lead to the conclusion that the accused persons are to be let off when the charges against them otherwise stand established on the basis of the other

reliable and trustworthy evidence. Every faulty investigation or padding in evidence cannot by itself lead to total demolition of prosecution case if it can otherwise stand ignoring these fallacies.

Reverting to the present case, it has to be kept in view that it stands fully established that Ramesh and Ratan and the accused persons were present at the cremation ground on the date and the time alleged by the prosecution. It has not been disputed and even otherwise stands established that Ratan and Ramesh went with the dead body of Ishwar Chand to the cremation ground. Roshan in his statement under Section 313 Cr.P.C. also does not dispute the presence of PW5 Baburam in the funeral procession of Ishwar Chand. Though some attempt was made in the trial court to dispute the presence of Roshan at the cremation ground by taking a plea that it was not customary for the father to attend the cremation of his son but rightly no such attempt was made before us. It stands fully established that Roshan and his sons the accused persons and Dharamvir were all present at the cremation ground. The factum of the murder of Ratan and Ramesh on the date and the time alleged has also been established and has rightly not been challenged by the defence. Their case, however, was that the two deceased were shot by some unknown person. The occurrence took place in the broad daylight in the presence of so many persons who had accompanied the dead body of Ishwar Chand to the cremation ground. It also stands established that the two bodies were recovered from the funeral pyre of Ishwar Chand after they had been badly burnt for over two hours.

It was not and could not, under the circumstances of the case, be the plea of anyone that all the three persons died together and were cremated together. The facts and circumstances do not suggest any such theory. Further, even in case of all simultaneous cremations of persons dying together, separate pyres are set up for individual dead bodies and not one for three persons belonging to three families, i.e., one son of Roshan, another son of Sitaram and another that of Moolchand. A great stress was laid by Mr. Malhotra that it could not be said as to which was the body of Ratan and which was that of Ramesh and that it was not possible to identify the said bodies on the basis that one of them was of heavy built up. We would assume that it was so. The assumption that bodies could not be identified, as contended, on the contextual facts, would make no difference. Keeping in view the manner in which Ratan and Ramesh were killed and put on the pyre of Ishwar Chand, it would hardly make any difference as to which out of them was the body of Ratan and which was that of Ramesh.

The reasons given above would equally apply to the absence of cause of death. The bodies had been extensively burnt and for that reason, it could not be ascertained whether the cause of death was shooting or burning. That also explains non-recovery of the pallets which would have lost in the burning pyre. The fact that the investigating team was not vigilant and did not take the trouble of searching pallets in the pyre would not be destructive of the prosecution case when it has been otherwise proved. It is not open to the accused persons to first make an attempt to destroy the evidence by throwing the two in fire and then contending that they are entitled to be acquitted for want of proof of identification of bodies and cause of death. There is unimpeachable evidence of PW1, PW2 and PW5 as to the manner in which the accused persons shot Ratan and Ramesh and threw them in the burning pyre of Ishwar Chand. The FIR was recorded within about an hour and half naming Roshan and his sons and brother-in-law of Ishwar Chand as accused and also narrating the manner of committing the crime. Once we believe PW1, PW2 and PW5, the aspect whether one gun shot wound entry on the body of Ramesh could be found while there was no exit entries or no gun shot injury was found on the body of Ratan, would be of no importance. As already stated, all this was a result of extensively burning of the bodies.

The accused persons were absconding and surrendered nearly three months after the commission of the crime. That explains the non-recovery of the weapons which is of no effect on the case. There is also no substance in the other minor points sought to be urged and noticed hereinbefore including the point regarding the timing of taking of the bodies by the Constable for post mortem or the preparation of some of the documents by the Police in pencil and mentioning of name of some or the other as the first accused in some documents or PW1 not being the witness to inquest documents. Regarding the contention that PW5 only saw Brahma carrying weapon and none else, it has to be borne in mind that Brahma was carrying double barrel gun whereas others were carrying revolver and country-made pistol which obviously had to be in the pocket and not demonstrated outside. We are unable to accept the contention that only Brahma may have committed the offence and others were falsely implicated.

Now, dealing with the criminal appeal filed by Roshan (Criminal Appeal No.620/2000) challenging his conviction under Section 201 IPC and criminal appeals filed by the State (Criminal Appeal Nos.944-45/2000) challenging the acquittal by the High Court of Dharamvir of all the charges and of Roshan of charge of murder, the factors that have prevailed with the High Court for their acquittal are two (1) Absence of the name of Dharamvir in the FIR; and (2) Not believing the prosecution case that Dharamvir and Roshan caught hold of Ratan and then he was shot by Brahma and Lakshmi. The High Court has, however, found that there is definite and consistent evidence that Roshan joined hands with other accused persons in throwing Ratan and Ramesh on the funeral pyre. In respect of Dharamvir and Roshan, the High Court has this to say :

"The name of Dharamveer was not indicated although the complainant knew him thoroughly. The role of Dharamveer is only to the extent of catching hold of Ratan. The other man who caught hold of Ratan was Roshan. According to the initial story, these two persons embraced Ratan from behind ('kauli bhar liya'). Sensing the difficulty that two persons at the same time may not embrace a person from behind, the story was changed to catching hold by each, by one hand of Ratan. It was argued on behalf of the defence that when every thing was pre-planned and when shooting was done from a very close range, there was no necessity for any person to catch hold of Ratan. It was argued on behalf of the State that Ratan was armed, it was necessary to catch hold of him by his hands. The fact that Ratan was armed goes against the theory of catching hold, as Ratan in that case could have tried to free himself and to use his arms against the persons catching hold of him. Moreover, when he was within the range of fire, the story of catching hold from behind or even catching hold by hand, does not appeal to reason. One of those persons who caught hold was not named and his name had come only during evidence. The story so far this aspect is concerned appears to be doubtful."

As already stated, Roshan got benefit of doubt for the charge under Section 302/149 but was convicted for offence under Section 201 IPC. The High Court said that :

"The story of catching hold of Ratan by this Dharamveer and Roshan has been changed from

the FIR stage to the trial stage and when everything was settled according to the prosecution story, there was no reason for catching hold of Ratan and the story is not only contradictory at two different stages, it appears improbable also as Ratan having an arm with him, does not offer any resistance, however, short the period might have been of that alleged confinement. There is no other evidence of participation of Roshan in the killing of Ramesh and Ratan. Dharamveer, therefore, must be given the benefit of doubt for all the charges against him while Roshan gets a benefit of doubt so far the charge under section 302/149 as also under section 147 is concerned. There is, however, definite and consistent evidence that he had joined hands with the other accused persons in throwing the dead bodies of Ratan and Ramesh on the funeral pyre. A plea was taken by Roshan that customarily, in their religion, the father does not attend the cremation of his son. The overwhelming evidence regarding his presence and participation in disposing of the dead body/injured body of Ratan and Ramesh suggests falsehood of this plea. Roshan although entitled for acquittal of charges under section 147 and 302/149 IPC may not escape the charge under section 201 IPC."

The evidence clearly demonstrates that none of the aforesaid two factors are justified. Firstly, in the FIR recorded on the statement of PW1 Sitaram, it is stated that Roshan and 'sala' (brother-in-law) of Ishwar Chand caught hold of Ratan who was fired with rifle on the head by Brahma and by country-made pistol by Lakshmi. Sitaram also states in the FIR that he can recognize the brother-in-law of Ishwar Chand on seeing him. It further notices that all of them threw the dead bodies on the pyre of Ishwar Chand. In evidence, PW1 has stated that he was perplexed and could not remember at that time the name of Dharamvir. PW1 has deposed that when Ratan refused to handover his revolver to Brahma, Roshan caught hold of Ratan from one side while Dharamvir took him in his grip from the other side and within no time Brahma fired his gun on his head while Lakshmi opened fire from his revolver. Dealing with the catching of Ratan by Roshan and Dharamvir, the trial court said : "In this connection it was pointed out on behalf of defence that in the report (Ext.Ka.1) (PW1) has stated that Roshan and the brother-in-law of Ishwar Chand (Dharamvir) clasped (Koli Bharli) Ratan. But now in his statement (PW1) said that Roshan caught him from one side, while Dharamvir caught him from the other side. I think the word "koli" also means taking in the grip. This difference of wordings is immaterial. The fact is the same. So there is no difference or contradiction in the statement of PW1 or of any other witness on this point. 'Koli Bharna' also means catching hold of the person from both the sides. At the same point it may be pointed out that it was argued on behalf of the defence that the theory of clapping or (Koli Bharna) is most improbable and unnatural. The case of the prosecution is that Roshan and Dharamvir caught hold of Ratan, while Brahma and Lakshmi opened their fires on him. It was contended that this position is highly improbable, because there was

every risk of causing injury to Roshan and Dharamvir as well. In that position the accused would not open fire on their own companions. In this connection 1961 Criminal Law Journal page 396 was cited on behalf of the defence. But in the instant case there was a reason for this clapping or catching hold of Ratan by Roshan and Dharamvir. It has come in evidence that Ratan was also armed with a Revolver which was hanging around his neck. In that position there was every possibility of Ratan's opening fire on the accused in case he saw the accused aiming towards him. In order to render Ratan unable to use his arm he was caught hold of by Roshan and Dharamvir making him quite helpless to be used as a target of the fires of Brahma and Lakshmi. Moreover, to avoid risk of injuries on the persons of Roshan and Dharamvir, Lakshmi and Brahma fired their fire arms on Ratan by placing the barrels of their fire arms on the very person of Ratan. Fixing by putting the weapons on the head of Ratan itself shows that it was precaution to avoid any injury to Roshan and Dharamvir who were controlling Ratan. So this was quite natural process in the circumstances of the case. As there were other persons also including the accused near Ratan and Ramesh, the letter were fired at them very close. According to PW1 the fires were shot instantaneously in a short while. Ramesh was shot at the same moment by Shyam Sunder and Kishan Chand."

We have minutely examined the evidence. By no stretch of reasoning, any fault could be found with the aforementioned finding of the trial court. By adopting a wholly erroneous approach, the High Court held that the role of Dharamvir was only to the extent of catching hold of Ratan or for coming to the conclusion that there was no such need or that there was any change of the story. Clearly, there is consistency right from the stage of recording of FIR as to the manner of commission of crime and upto the stage of deposition by PW1 corroborated by other eye-witnesses PW2 and PW5. From the evidence, it is fully established that deceased Ratan had to be immobilized as he was carrying in his neck his revolver; he was immobilized by catching hold of by Roshan and Dharamvir which facilitated his shooting by Brahma and Lakshmi and Roshan and Dharamvir with others threw him on the pyre of Ishwar. Roshan and Dharamvir had been charged for offence under Section 302/149 IPC. The prosecution has fully established its case against them as well. We are unable to sustain the acquittal of Dharamvir of the charges under Sections 302/149 and 201/149 IPC of which he was convicted and consequently sentenced by the trial court. Similarly, we are also unable to sustain the acquittal of Roshan of charge under Section 302/149 IPC.

In view of the aforesaid discussion, we dismiss the appeal (Criminal Appeal No.620/2000) of Roshan Lal and also Criminal Appeal No.619/2000 of the other accused and allow the appeals of the State (Criminal Appeal Nos.944-45 of 2000) and set aside the impugned judgment and order and restore that of the trial court holding Roshan and Dharamvir guilty as aforesaid for offences under Section 302/149 IPC and Section 201/149 IPC and consequently sentencing them as well. We restore the judgment and order of the trial court in respect of Roshan and Dharamvir also and to that extent allow the appeals of the State. In this view, Roshan and Dharamvir shall be taken into custody to undergo the remaining part of their sentences.

All the appeals are disposed of accordingly.

JUDIS