

PETITIONER:
NAMWAR DUBEY & ORS.

Vs.

RESPONDENT:
STATE OF UTTAR PRADESH

DATE OF JUDGMENT 21/08/1995

BENCH:
MUKHERJEE M.K. (J)
BENCH:
MUKHERJEE M.K. (J)
NANAVATI G.T. (J)

CITATION:
JT 1995 (6) 222 1995 SCALE (4) 774

ACT:

HEADNOTE:

JUDGMENT:

JUDGMENT

M.K. MUKHERJEE, J.

The four appellants herein and two others were tried by the Additional Session Judge, Gyanpur for offences punishable under Sections 148, 302/149 and 307/149 of the Indian Penal Code (IPC for short). The trial ended with an order of conviction and sentence recorded against all of them. Aggrieved thereby they preferred an appeal in the High Court which, as regards the appellants was allowed only in part in that their conviction under Section 148 IPC was set aside but the other convictions were only altered to section 302/34 and 307/34 IPC. The remaining two convicts were however, acquitted of all the charges.

Briefly stated. The prosecution case as narrated in the trial was that on September 8, 1977, at or about 8.00 A.M. Kamla Shankar Dubey (PW 1) accompanied by his brother Ram Surat Dubey (PW 2) and uncle Loghar Dubey (the deceased) left their house for going to Bhadoni. When they reached the Mirzapur Bhadhi Road near the local market all the six accused persons who were armed with various weapons including pistols accosted them and, on the exportation of Jadunath (since acquitted). Siya Ram Rahhiya and Namwar (three of the appellants herein) started firing from their respective fire-arms causing injuries to PW 2. All three of them then started running away in different directions only to be chased by the miscreants. While PW 1 succeeded in his attempt other two could not as PW 2 fell down hit by Ranvir (the other appellant with a candasa and loonar. Who had taken refuge in the shop of one lalta. met with his death at the hands of the other miscreants. Thereafter PW 1 went to the police station and looted an information about the incident. SHO Surender Bahadur Singh (PW 5) took up investigation of the case and first went to the Government Hospital Bhadohi where he recorded the statement of PW 2. As PW 2's condition was grave he was referred to the District Hospital Varanasi and there a Magistrate recorded his dying

declaration.

PW 5 went to the scene of occurrence and after completing the inquest proceeding forwarded the dead body of Lagnar to the Government Hospital. Gyanour for post-mortem examination. After examining the witnesses and completing other formalities of investigation he submitted charge-sheet 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 contended that they had been falsely implicated due to enmity.

To bring home the charges levelling against the accused the prosecution examined Kamla Shankar Dubey (PW 1) and injured Ram Surat (PW 2) as the two eye witnesses. The trial Court found that notwithstanding the fact that they were closely related to the deceased their evidence could be safely relied upon as it stood corroborated by other evidence on record. In appeal, the High Court held that the claim of Kamla Shanker Dubey that he had seen the incident could not be entertained as his house was at a distance of 2.1/2 furlongs away from the scene of occurrence and in all probabilities he had reached the place of incident only after it had taken place. The High Court, however, found the evidence of PW 2 reliable and sufficient to sustain the prosecution case but nonetheless felt inclined to give the benefit of reasonable doubt to the other two accused as there was no evidence of their participation in the actual assault either of PW 2 or the deceased.

Having regard to the fact that the High Court has, for justifiable reasons, found the presence of PW 1 at the time of the incident doubtful we are left with the only question as to whether the evidence of PW 2 is of such a sterling quality that it could be made the sole basis for upholding the conviction of the appellants by the High Court. To answer this question we have carefully considered his evidence in the light of other evidence on record and particularly his statement, which was recorded by the Magistrate as his dying declaration (Ext. Kha.1) and can now be treated as his earlier statement recorded under Section 164 of the Code of Criminal Procedure, and keeping in mind that while exercising its jurisdiction under Article 136 of the Constitution this Court does not reappraise evidence to disturb a concurrent finding of fact unless grave and palpable injustice has been occasioned thereby. Such exercise of ours persuades us to unhesitatingly hold that PW 2 is unworthy of credit as his evidence materially debars from and contradicts his earlier statement made before the Magistrate.

The most glaring discrepancy which goes to the root of the matter and shatters the cases version of PW2 is as regards the site where the murderous attack on Lagnar took place. According to his sworn testimony the entire assault on the deceased took place in the shop of Lalta which as the evidence on record shows, was at a distance of about 40/50 feet to the east of Varanasi-Bhaoohi Road. In his earlier statement he however stated that his uncle was shot at and died on the road. Indeed, in his earlier statement he did not even mention about the shop of Lalta. The reason for such shifting of the place of occurrence is not far to seek. The investigation Officer stated in his evidence that he found blood only in the shop of lalta and nowhere else. Obviously to fit in with the presence of blood only in the shop of Lalta, PW 2 made the above concocted statement in Court. As regards the sequence of events also there is a marked discrepancy in the evidence of PW 2. At the trial he

stated that as soon as they reached the road the miscreants bounced upon them. But his earlier statement was that after coming out of their house they went to a petal shop and there while they were waiting for the betels ordered by them to be served the miscreants came there and attacked them. PW 2 next stated in his deposition that after being assaulted he rushed to the courtyard of Ramdular which was on the western side of the Varanasi, Bhadohi Road and from there he saw the assault on his uncle in the shop of Lalta. but earlier he had stated that after being assaulted when he went running to the house of Ramdular he did not allow him to enter apprehending that he (Ramdular) might be fired at also and that he fell down in front of his gate. There is also material discrepancy as regards the nature of weapons carried by the appellants and used for assault on him and his uncle.

It appears that when PW 2 was confronted with different portions of his earlier statement in accordance with Section 145 of the Evidence Act. he claimed that he was unconscious and denied to have made the statements attributed to him. That such claim of PW2 was false - and was obviously made to ripple out of the earlier statement - would be patently clear from the unimovable evidence of Dr. B.P. Singh (D.W.I who was the Medical Officer of Varanasi Hospital at the material time. He testified that in his presence Shri S.M. Maurya, Deputy Collector, Varanasi recorded the dying declaration of Ram Surat in his presence and that Ram Surat was in his senses. In support of his testimony he not only proved the dying declaration but also his endorsement and that of the Magistrate thereon. In cross examination he denied the suggestion that Ram Surat was senseless and was not able to give the statement.

For the foregoing discussion we are unable to conclusively infer solely relying upon the evidence of PW 2 that the four appellants committed the murder of his uncle or attempted to commit his murder. The appeal is therefore, allowed. The impugned order of conviction and sentence is hereby set aside and the appellants are acquitted of all the charges. The appellants who are in jail be released forthwith.