REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS.484-487 of 2008

SHEIKH JUMAN & ANR. ETC. ... APPELLANT(S)

:VERSUS:

STATE OF BIHAR ... RESPONDENT(S)

JUDGMENT

Pinaki Chandra Ghose, J.

1. These appeals are directed against the judgment and order dated 5th October, 2007 passed by the High Court of Judicature at Patna in Criminal Appeal Nos.122, 92, 98 and 123 of 2003, whereby the High Court while confirming the conviction of the appellants and the sentence of life term, commuted the death sentence of Sheikh Shamsul and Sheikh Gheyas, to imprisonment for life and dismissed the appeals.

1. The brief facts necessary to dispose of these appeals

are that on 19.01.1991 at about 6:00 pm, one Askari (since deceased), who happened to be the nephew of the informant (PW14) was at his grocery shop when appellants armed with bomb explosives and guns came near his shop. Appellant Sheikh Shamsul hurled a bomb at the deceased and as a result of the explosion Askari fell down on the *Gaddi* of the shop. In the meanwhile, appellant Sheikh Ashfaq also attacked him by a bomb which hit him on the chest and exploded and consequently Askari died at the Gaddi itself. Informant's another nephew, namely, Mohd. Asad, who was at the Flour Mill just opposite the shop of Askari, hearing the sound of explosion came running to the shop and he was also attacked by a bomb by accused Sheikh Gheyas. Due to explosion Mohd. Asad sustained severe injury, fell down near the shop and became unconscious. Md. Vasir (PW1) who was standing there was also injured. On hearing the sound of the bomb explosion, villagers assembled there and appellants fled away towards North, firing shots in the air. Injured Mohd. Asad was taken to

Bhagalpur hospital by the villagers in critical condition but he succumbed to injuries at the hospital on the same day.

2. Motive of the occurrence, according to first information report ('FIR'), is that two years prior to the occurrence, a case under Section 307 of IPC was filed by the informant against the appellants and they were threatening the informant to withdraw the case, otherwise they would eliminate the whole family.

3. The law was set into motion upon lodging of FIR by PW14 (informant) arising out of Fardbeyan being Ext. No.7 on the same day at 10:00 pm, at Shahkund Police Station. The FIR was registered as C.R. No.I-69 of 2009. The post-mortem of the deceased was performed by Dr. H.I. Ansari (PW13). Looking to the post-mortem note of deceased Mohd. Askari, marked Annexure A-13, there were found explosive blast injuries on chest cavity deep, face; both lungs and hear were lacerated. As per the Post-mortem Report of deceased Mohd. Asad, there were found blast explosive injury on abdominal cavity;

lacerated and bruise skin and lever. Both the deceased died due to injuries caused by powerful bomb blast as per above stated post-mortem reports marked Ext.13 and 13/13.

4. Upon completion of investigation and submission of the charge sheet, Sessions Case No.309/22 of 1993/1999 was registered against the accused. Thereafter, the Court of 1st Additional District & Sessions Judge, Bhagalpur, framed charges against the accused persons for the offences punishable under Sections 302, 302 read with Section 149 of IPC, Sections 3, 4 of the Explosive Substances Act, and Section 27 of the Arms Act. After they denied the said charges in their statements, the evidence of prosecution witnesses was recorded.

5. After recording the evidence of the prosecution witnesses and considering all the relevant facts, the Trial Court vide its judgment and order dated 4.02.2003 convicted accused No.3, 8 and 9 for the offence punishable under section 302 of IPC and Sections 3, 4 of

Explosive Substances Act and sentenced accused Nos.3 and 9 (Sheikh Shamsul and Sheikh Gheyas) to death since the Court did not want to give them opportunity to commit third homicide as they had already been convicted previously in some other homicidal death case. Accused No.8 was sentenced to imprisonment for life. The accused No.7 Sheikh Chengwa was convicted for offence punishable under Section 302 read with Section 149 IPC and Sections 3 & 4 of the Explosive Substances Act and sentenced him to rigorous imprisonment for 10 years. Rest of the accused were convicted for the offences punishable under Section 302 read with Section 149 of IPC and Section 27 of the Arms Act and sentenced to undergo rigorous imprisonment for a period of three years.

6. Being aggrieved by the aforesaid judgment and order of the Trial Court, the accused persons filed appeals before the High Court. While 1st Additional Sessions Judge, Bhagalpur, made Death Reference No.2 of 2003 vide letter dated 18.02.2003 for confirmation of

death sentence, Criminal Appeals Nos.92, 98, 122-126 of 2003 were preferred by the accused persons seeking acquittal.

7. The High Court vide its judgment and order dated 5th October, 2007, rejected the death reference and also dismissed the aforesaid appeals filed by accused persons and confirmed their conviction. However, the death sentence of accused Sheikh Samsul and Sheikh Gheyas was commuted to imprisonment for life. Aggrieved by the aforesaid judgment and order passed by the High Court, the accused persons have sought to challenge the same before us in these appeals.

8. Keeping in mind the position of law as enunciated in the case of ***Ganga Kumar Srivastava*** Vs. ***State of Bihar***, (2005) 6 SCC 211, pertaining to the principles for exercise of power under Article 136 of the Constitution of India and settled by a series of decisions of this Court, we shall now examine the evidence adduced by the parties and the materials on record and see that in view of the nature of offence alleged to have been committed by the

appellants, whether the concurrent findings of fact call for interference in the facts and circumstances of the case.

9. In the present case, there are concurrent findings of both the Courts below as to the guilt of the accused persons. The High Court has discussed basically four issues in its judgment, viz. (a) interpretation of Section 172 of Code of Criminal Procedure, 1973; (b) veracity of the evidence adduced; (c) relevance of overt act in conviction under Section 149 of the Penal Code; and (d) rarest of the rare cases theory for confirming death sentence.

10. On the first issue, the High Court has observed that police dairy cannot be used as evidence in the case but to aid it in such inquiry or trial, while relying upon the judgment of this Court in ***Habeeb Mohammad Vs. State of Hyderabad***, AIR 1954 SC 51: 1954 SCR 475, wherein it was held that when attention of a witness is not drawn to his previous statement during the course of investigation, same cannot be looked into in exercise of

powers under Section 172(2) of the Code of Criminal Procedure. Apropos second issue, it was observed by the High Court that failure of witness to go to police station and lodge the report on time without delay, and minor contradictions pertaining to presence of customers at the shop, in no way, affects the case of the prosecution.

11. High Court further found distinction between judgments given in the case of ***Shambhu Nath Singh Vs. State of Bihar***, AIR 1960 SC 725 and that of ***Ram Dular Rai & Ors. Vs. State of Maharashtra***, 1961 SCR (2) 773, though both the judgments discuss Section 149 of the IPC pertaining to unlawful assembly. With regard to third issue, it was observed by the High Court that merely because informant (PW14) was left unharmed or that all appellants did not enter into the shop, the prosecution case cannot be rejected, since overt act of acting and omitting with regard to common object was proved after appraisal of the evidence in the Court below. In support of the fourth issue, the High Court while relying upon its earlier judgments in ***State of Bihar Vs.***

Sanjeet Rai and Anr., 2006 (4) PLJR 479 *and* ***State of Bihar Vs. Prajeet Kumar Singh***, 2006 (2) PLJR 656, rejected the death reference holding that the case was not falling in the category of rarest of rare cases.

12. While upholding the judgment and order of conviction passed by the Trial Court, the High Court has primarily relied upon the evidence of eye-witnesses, PW14, PW4, PW5 and PW9 who were found to be trustworthy and reliable. The High Court held that the accused were sharing the common object of doing away the deceased. However, from a perusal of the cross examinations of PW4 and PW5, it appears that there was personal enmity and PW3, PW4, PW14 were made accused in a case of murder of Asfak, son of Sheikh Samsul, appellant herein. PW14 had also filed a case under Section 307 of IPC against the appellants two years prior to the date of the incident which was still pending.

13. Further, looking to the evidence given by PW9, though not an eye-witness, the factum of assault with a

bomb on deceased Mohd. Asad was corroborated. According to him he is also a witness to the seizure of empty cartridge from Sheikh Ishteyaque.

14. Mr. Huzefa Ahmadi, learned senior counsel for appellants contented that both the Courts below have committed an error in convicting the appellants for the offence punishable under Section 302 IPC, along-with other accused. He submitted that there were material improvements made by PW14 in his deposition when compared to the *fardbeyan* given to the police on the date of the incident and no specific role has been attributed to the present appellants. But after careful analysis of the *fardbeyan* (Ext.7), we have an entirely different opinion. It is true that deposition is somewhere literally larger than the *fardbeyan*, however, it is no where contrary to it. It may rightly be said that the deposition of PW14 is merely elaborated form of statement recorded before the police, with minor contradictions. Oral evidence of a witness could be looked with suspicion only if it contradicts the previous statement.

15. He further submitted that narration of the incident by the deceased Asad to PW3, as stated by PW3, is only to falsely implicate the present appellants. According to him, such deposition is improbable since PW15 – Investigating Officer of the case and PW12 did not narrate that deceased had regained consciousness and named the accused and no other witness was examined to prove the fact that deceased regained consciousness and most importantly no recovery of gun has been made. Thus, the prosecution case is shrouded with reasonable doubt. It was further argued that in the light of judgment of this Court in the case of ***K. M. Ravi and Ors. Vs. State of Karnataka***, (2009) 16 SCC 337, the appellants holding outside shop cannot be held guilty, wherein it was held that *"mere presence or association with other members alone does not per se be sufficient to hold everyone of them criminally liable for the offences committed by the others unless there was sufficient evidence on record to show that one such also indented to*

or knew the likelihood of commission of such an offending act."

16. Reliance was further placed on the judgment of this Court in ***Jodhan Vs. State of Madhya Pradesh***, (2015) 11 SCC 52, wherein it was held in paragraphs 25 & 26 that if the testimony is of an interested witness who have a motive to falsely implicate the accused then the Court before relying upon his testimony should seek corroboration in regard to material particulars. In paragraphs 28 & 29 also it was held that the testimony of the injured witness stands on a higher pedestal than other witnesses and reliance should be placed on it unless there are strong grounds for rejection of his evidence. [See also ***Hem Raj and Ors. Vs. State of Haryana***, (2005) 10 SCC 614]

17. Finally, it has been argued by the learned senior counsel appearing for the appellants that the post-mortem report does not support the prosecution story that injury was caused only by a powerful bomb. It was submitted that both the deceased were not close to

each other and deceased Asad was running towards the shop when a bomb was allegedly thrown at him. Other accused were standing with guns in their hands but they did not share the common object and hence cannot be held liable. In support of this, learned senior counsel relied on the case of ***Bhim Rao and Ors. Vs. State of Maharashtra***, (2003) 3 SCC 37, wherein it was observed:

> "In the absence of any material to the contrary, it should be presumed that those members of the original unlawful assembly who only shared the common object of assaulting deceased Prabhakar cannot be attributed with the subsequent change in the common object of some of the members of the assembly who entered the house of Prabhakar and caused grievous injuries to him. So far as the present appellants are concerned, who stood outside the house of the deceased and who could not have known what actually transpired inside the house, the act of those members of the original unlawful assembly who entered the house, cannot be attributed, hence, as contended by the learned counsel for the appellants at the most these appellants will be liable to be punished for sharing the original common object which is only to assault the deceased, therefore, they can be held guilty of an offence punishable under Section 352 read with Section 149 only."

18. Mr. Ravi Bhushan, learned counsel appearing for the respondent-State, on the other hand, supported the order of conviction and sentence passed by both the Courts below. He submitted that judgments cited by the counsel for appellants have no point relevant to the present case. The judgment given in the case of *K. M. Ravi* (supra), is not relevant in whatsoever manner to the present case, as in the present case, there was facilitating the act of hurling of bombs by the other accused persons as well as captivating the relatives of the deceased so as to prevent them to come to his rescue. This shows their active participation in the crime though having overt act of merely holding guns outside the place of occurrence.

19. It was further argued that the position cited in *Bhim Rao's case* (*supra*) is different from that of the present case. PW14 and other witnesses present with him were prevented from saving the victims while bombs were hurled at the deceased. While relying upon the evidence of PW4, PW5, PW6 and PW16 and other witnesses, it is

corroborated that after hurling of bomb by Shamsul and Ashfaq the appellants fled away by firing in the air. One of the appellants was caught with hot cartridge tied in his lungi by PW-16 and this fact has been corroborated by PW7, PW9, PW14, PW15 and PW16. Therefore, the prosecution case leaves no room for doubt whatsoever about the commission of offence by the appellants.

20. We have seen in the instant case that the witnesses have vividly deposed about the genesis of the occurrence, the participation and involvement of the accused persons in the crime. The non-examination of the witnesses, who might have been there on the way to hospital or the hospital itself when deceased narrated the incident, would not make the prosecution case unacceptable. Similarly, evidence of any witness cannot be rejected merely on the ground that interested witnesses admittedly had enmity with the persons implicated in the case. The purpose of recoding of the evidence, in any

case, shall always be to unearth the truth of the case. Conviction can even be based on the testimony of a sole eye-witness, if the same inspires confidence. Moreover, prosecution case has been proved by the testimony of the eye-witness since corroborated by the other witnesses of the occurrence. We are constrained to reject the submissions made on behalf of the appellants.

21. Keeping the facts and circumstances of the present case in mind, we wish to emphasize the judgment of this Court in ***Jodhan's*** *case* (*supra*) and the relevant part of the judgment is reproduced hereunder:

> "*On the bedrock of the aforesaid pronouncement of law, the submission canvassed by Mr. Sharma does not merit any consideration inasmuch as the prosecution has been able to establish not only the appellant's presence but also his active participation as a member of the unlawful assembly. He might not have thrown the bomb at the deceased, but thereby he does not cease to be a member of the unlawful assembly as understood within the ambit of Section 149 IPC and there is ample evidence on record to safely conclude that all the accused persons who have been convicted by the High Court had formed an unlawful assembly and there was common object to assault the deceased who succumbed to the injuries inflicted on him. Thus analysed, the submission enters into the realm of total*

insignificance."

22. In the instant case, the witnesses, as the High Court has found and we have no reason to differ, are reliable and have stood embedded in their version and remained unshaken. They have vividly deposed about the genesis of occurrence, the participation and involvement of the accused persons in the crime and the injuries inflicted on the deceased, and on each of them.

23. Thus, in the light of the above discussion, we are of the view that the present appeals are devoid of merits and the judgment passed by the High Court does not warrant interference. These appeals are, accordingly, dismissed.

.....J.
(**Pinaki Chandra Ghose**)

.....J.
(**Ashok Bhushan**)

New Delhi;
February 23, 2017.