REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 556 OF 2021

Rakesh and another …Appellants

Versus

State of U.P. and another …Respondents

J U D G M E N T

M.R. SHAH, J.

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 10.09.2018 passed by the High Court of Judicature at Allahabad in Criminal Appeal No. 2811 of 2008, by which the High Court has dismissed the said appeal preferred by the appellants – original accused challenging their conviction for the offence punishable under Section 302 r/w 34 of the IPC, passed by the learned Additional District & Sessions Judge, Fast Track Court No.2,

Hathras (hereinafter referred to as the learned “trial Court”), the original accused nos. 1 & 3 have preferred the present appeal.

2. That both the appellants herein along with one another accused – Suresh were tried by the learned trial Court for the offences punishable under Section 302 r/w 34 of the IPC for having killed one Bhishampal Singh in an incident which happened on 28.01.2006. The role attributed to A1 – Rakesh was that he used countrymade pistol and caused injuries on the deceased. It was alleged that so far as Suresh and Anish – A2 & A3 are concerned, they assaulted the deceased with their respective knives. That after the full-fledged trial, the learned trial Court held all the accused guilty for the offence punishable under Section 302 r/w 34 of the IPC and sentenced all of them to undergo life imprisonment. The accused were also convicted for the offences punishable under Sections 4/25 of the Arms Act for which a separate sentence was also imposed by the learned trial Court. While convicting the accused, the learned trial Court heavily relied upon the depositions of PW1 and PW2 – eye witnesses and also the medical evidence and the deposition of Dr. Santosh Kumar – PW5 who conducted the post-mortem on the body of the deceased.

3. Feeling aggrieved and dissatisfied with the judgment and order of conviction and sentence passed by the learned trial Court convicting the accused for the offence punishable under Section 302 r/w 34 of

the IPC and imposing the sentence of life imprisonment and also for the offences under the Arms Act, all the accused preferred appeal before the High Court being Criminal Appeal No. 2811 of 2008. By the impugned judgment and order, the High Court has dismissed the said appeal and has confirmed the conviction of the accused for the offences under Section 302 r/w 34 of the IPC and the sentence imposed of life imprisonment.

4. Feeling aggrieved and dissatisfied with the impugned judgment and order of the High Court, original accused no.1 -Rakesh and accused no.3 – Anish have preferred the present appeal. It appears that original accused no.2 – Suresh has not preferred any appeal.

5. Shri Rishi Malhotra, learned Amicus Curiae has appeared on behalf of the appellants and Shri Vinod Diwakar, learned Additional Advocate General has appeared on behalf of the State of Uttar Pradesh and Shri Arjun Dewan, learned Advocate has appeared on behalf of the original complainant.

5.1 Shri Rishi Malhotra, learned Amicus has vehemently submitted that both, the learned trial Court as well as the High Court have committed a grave error in convicting the accused, relying upon the depositions of PW1 and PW2.

5.2 It is vehemently submitted that so far as PW2 is concerned, his presence on the spot at the time of the incident is absolutely

doubtful. It is submitted that even according to him he came subsequent to the occurrence of the incident. It is submitted that as such he has specifically admitted in the cross-examination that when they had reached the court at 10:30 a.m., the next date of hearing was given as the Presiding Officer was not there. It is submitted that he was also confronted about the fact that he had come to the spot only after receiving the information about the incident. It is submitted that PW2 has specifically admitted that he reached the court before the deceased and PW1 at 10:00 a.m. and had moved an application for exemption from appearance of the accused in that case. According to the learned counsel appearing on behalf of the appellants, he also admitted that on 29.01.2006 he alone came to the court and did not have a word with the deceased on the morning of 28.01.2006. It is submitted therefore no reliance could have been placed upon the deposition of PW2.

5.3 It is further submitted by the learned Amicus that as such and it is an admitted position that there was an enmity and prior disputes between the accused and the deceased and even PW1. It is submitted that the deceased was facing criminal trial under Section 307 of the IPC on the allegation of murder attempt on A1 – Rakesh. It is submitted therefore there are all possibility of falsely implicating the A1 – Rakesh.

5.4 It is further submitted that so far as the other accused – A2 & A3, namely, Suresh and Anish are concerned, from the ocular evidence as well as medical evidence, it is clear that they caused injuries on the deceased after the deceased died, i.e., on the dead body. It is submitted therefore that when they inflicted injuries on the dead body, i.e., after the deceased died by gun shot, they cannot be convicted for the offence punishable under Section 302 as by the time the accused A2 & A3 have alleged to have caused injuries, the deceased had died. It is submitted that even PW1 in his cross-examination has admitted that the moment deceased received gun shot injury he fell down and died.

5.5 It is further submitted that even according to PW1 and even PW2 the matter was already adjourned and even the 'Sick Note' was given on behalf of the deceased. It is submitted therefore when the 'Sick Note' was given and the matter was already adjourned, there was no reason for the deceased and PW1 to come to court. It is submitted that it is very much doubtful that the deceased and PW1 reached the court and/or went to the court room.

5.6 It is further submitted by the learned Amicus appearing on behalf of the appellants that even there are material contradictions insofar as use of weapon by A2 & A3 are concerned. It is submitted

that what was recovered was ‘knife’ and PW2 has categorically stated that the deceased was assaulted by ‘dagger’ and not by ‘knife’.

5.7 It is submitted that there is a difference between ‘dagger’ and ‘knife’. It is submitted that even Dr. Santosh Kumar – PW5 has specifically admitted that injuries nos. 2 to 8 (incised injuries) cannot be caused stabbing by knife. It is submitted that the doctor has specifically admitted in the cross-examination that incised injuries nos. 2 to 8 are not mentioned clean-cut and it was difficult to state that the alleged weapon was not sharp on both the sides.

5.8 It is further submitted that it has also come in evidence that as per the ballistic report bullet did not match with the alleged pistol used by the accused – Rakesh.

5.9 It is submitted that the appellants are in custody since January, 2006 and have already undergone more than 15 years of sentence.

5.10 Making the above submissions, it is prayed to allow the present appeal and quash and set aside the conviction and sentence imposed by the learned trial Court, confirmed by the High Court.

6. Shri Vinod Diwakar, learned Additional Advocate General appearing on behalf of the State of Uttar Pradesh has vehemently submitted that in the facts and circumstances of the case, no error has

been committed by the learned trial Court convicting the accused, relying upon the depositions of PW1 & PW2.

6.1 It is submitted that both, PW1 & PW2 are trustworthy and reliable witnesses. It is submitted that their presence at the time of incident has been established and proved by the prosecution by examining PW1 & PW2. It is submitted that both, PW1 & PW2 have been fully and thoroughly cross-examined and considering the entire evidence/deposition of PW1 & PW2, their presence at the time of incident has been established and proved. It is submitted that on each and every aspect on which the learned counsel appearing on behalf of the accused – defence has made submissions, PW1 and PW2 were cross-examined. It is submitted that thereafter on appreciation of entire evidence on record, the learned trial Court has convicted the accused and the same has been rightly confirmed by the High Court.

6.2 It is submitted that in the present case the motive has been established and proved. It is submitted that the defence has failed to establish and prove that they were falsely implicated in the case.

6.3 It is further submitted by the learned Additional Advocate General appearing on behalf of the State of Uttar Pradesh that as such nothing is on record and/or there is no evidence on record to even suggest that A2 & A3 caused injuries on the deceased by the

time he died. It is submitted that the aforesaid defence is not borne out at all either from the deposition of PW1, PW2 or even PW5.

6.4 It is submitted that as such the prosecution has fully established and proved that on 28.01.2006 the deceased, PW1 & PW2 attended the court. It is submitted that, however, the court was not available on that date as the learned Presiding Officer was on inspection and therefore before they reached, the matter was adjourned. It is submitted that 'Sick Note' on behalf of the deceased has already been explained by PW1 in his deposition.

6.5 It is further submitted that in the present case even recovery of weapon/weapons used by the accused has been established and proved.

6.6 It is further submitted that even the accused did not lead any evidence to prove that they were not present on the spot at the time of incident and that they were present elsewhere.

7. Shri Arjun Dewan, learned Advocate appearing on behalf of the original complainant has adopted the submissions made by the learned Additional Advocate General appearing on behalf of the State of Uttar Pradesh. In addition, it is vehemently submitted by the learned counsel appearing on behalf of the complainant that the evidence of PW1 & PW2 is credible. It is submitted that their presence at the time of incident has been established and proved. It

is submitted that PW2 has consistently stated that he saw the accused herein on a motorcycle going towards the deceased victim and he witnessed the accused no.1 – Rakesh shooting the deceased victim and accused no.2 – Suresh assaulting the deceased with a knife. It is submitted that there might be some minor contradictions but as held by this Court in the case of *Yogesh Singh v. Mahabeer Singh, (2017) 11 SCC 195 and Prabhu Dayal v. State of Rajasthan, (2018) 8 SCC 127,* that minor discrepancies should not be given undue importance that don't go to the root of the matter.

7.1 Now so far as the submission on behalf of the accused that as per the ballistic report the bullet found did not match with the gun recovered, it is submitted that as held by this Court in the case of *Himanshu Mohan Rai v. State of U.P., (2017) 4 SCC 161*, in a case where the ballistic report is contrary to the evidence of the witnesses, but the statements of the witnesses have inspired the confidence of the Court and have been held to be credible and reliable, then such a contradiction between the ballistic report and the credible evidence of a witness cannot be the basis of rejecting the evidence of a witness. It is submitted that at the most the recovery of the weapon/gun may not be believed, but when PW1 & PW2 have specifically stated that it was the A1 who fired and caused injury on the deceased which is fully supported by the medical evidence – injury no.1 and in fact there was

a gun shot injury on the deceased and therefore on the aforesaid aspect, PW1 & PW2 are fully supported by the medical evidence, the aforesaid cannot be a ground to acquit the accused.

7.2 It is submitted that there is a recovery of knife at the instance of A1, which was used by A2 for commission of the offence. It is submitted that as such no question with respect to knife recovered can cause injury nos. 2 to 8 was put to Dr. Santosh Kumar – PW5.

7.3 It is further submitted that even in the recovery memo which was immediately taken during the course of investigation had the signatures of PW1. It is submitted therefore the presence of PW1 has already been established and proved.

7.4 It is further submitted that as such there are concurrent findings of fact recorded by the learned trial Court as well as the High Court, which are on appreciation of evidence on record. It is submitted that therefore no case is made out to interfere with the impugned judgment and order of conviction and sentence imposed by the learned trial Court, confirmed by the High Court.

8. We have heard the learned counsel for the respective parties at length. We have carefully gone through the judgment and order of conviction and sentenced passed by the learned trial Court as well as the impugned judgment and order passed by the High Court. We have also re-appreciated the entire evidence on record, more

particularly the depositions of PW1, PW2 and PW5. We have also considered the injuries found on the dead body of the deceased.

9. From the judgment and order passed by the learned trial Court, it appears that while convicting the accused, the court has heavily relied upon the depositions of PW1, PW2 and PW5. PW1 and PW2 are stated to be the eye-witnesses to the incident. Having gone through the entire depositions of PW1 & PW2 and even the cross-examination of the aforesaid two witnesses, we are of the firm opinion that both, PW1 & PW2 are trustworthy and reliable witnesses. Their presence at the time of incident with the deceased has been established and proved by the prosecution. The presence of PW1 and even PW2 at the time of incident is natural. PW1 is the son of the deceased who accompanied the deceased to attend the court. Similarly, PW2 also was required to attend the court and therefore he reached the court and thereafter he saw the incident. Both the witnesses have been fully and thoroughly cross-examined. There may be some minor contradictions, however, as held by this Court in catena of decisions, minor contradictions which do not go to the root of the matter and/or such contradictions are not material contradictions, the evidence of such witnesses cannot be brushed aside and/or disbelieved.

In the present case, both the aforesaid witnesses are thoroughly cross-examined on each and every aspect pointed out by the defence. However, they have fully supported the case of the prosecution. PW1 has also explained the giving of the 'Sick Note' on behalf of the deceased when such a question was asked in the cross-examination. PW1 has categorically stated that when they reached, the matter was already adjourned as the learned Presiding Officer was on inspection and was not available in the court. By the time they reached, the matter was already adjourned. As at the time when the matter was adjourned the deceased and PW1 could not reach the court, the learned advocate gave the sick note and prayed for exemption. The matter came to be adjourned and thereafter PW1 and the deceased reached the court. From the entire evidence on record, it is established and proved that the deceased and PW1 went to the court, thereafter the matter was adjourned and thereafter while returning just 15 to 20 minutes away from the court, the incident had taken place. The place of incident has been established and proved by the prosecution.

10. Now so far as the submission on behalf of the defence that PW2 stated that he reached the spot subsequently after he received the message is concerned, what is required to appreciate and consider the evidence as a whole. When a specific question was

asked to him that in the statement before the police, he stated that he reached subsequently, PW2 has specifically denied the same and he has categorically stated that no such statement was given by him to the police and he does not know how such a statement was recorded in his statement. No question has been asked by the defence to the person/IO who recorded the statement of PW2. Considering the entire deposition as a whole, we are of the opinion that the prosecution has been successful in proving the presence of PW1 & PW2 at the time and place of incident. They are found to be trustworthy and reliable.

11. Now so far as the submission on behalf of the accused that as per the ballistic report the bullet found does not match with the fire arm/gun recovered and therefore the use of gun as alleged is doubtful and therefore benefit of doubt must be given to the accused is concerned, the aforesaid cannot be accepted. At the most, it can be said that the gun recovered by the police from the accused may not have been used for killing and therefore the recovery of the actual weapon used for killing can be ignored and it is to be treated as if there is no recovery at all. For convicting an accused recovery of the weapon used in commission of offence is not a sine qua non. PW1 & PW2, as observed hereinabove, are reliable and trustworthy eye-witnesses to the incident and they have specifically stated that A1-

Rakesh fired from the gun and the deceased sustained injury. The injury by the gun has been established and proved from the medical evidence and the deposition of Dr. Santosh Kumar, PW5. Injury no.1 is by gun shot. Therefore, it is not possible to reject the credible ocular evidence of PW1 & PW2 – eye witnesses who witnessed the shooting. It has no bearing on credibility of deposition of PW1 & PW2 that A1 shot deceased with a gun, particularly as it is corroborated by bullet in the body and also stands corroborated by the testimony of PW2 & PW5. Therefore, merely because the ballistic report shows that the bullet recovered does not match with the gun recovered, it is not possible to reject the credible and reliable deposition of PW1 & PW2.

12. Now so far as the submission on behalf of the defence that at the most it can be said that A2 & A3 caused injuries on the dead body as according to them they caused injuries after the gun shot fired on the deceased and the deceased fell down and died. Therefore, it is the case on behalf of A2 & A3 that having been caused the injuries on the dead body, they could not have been convicted for the offence punishable under Section 302 IPC. However, it is required to be noted that A2 & A3 are convicted with the aid of Section 34 of the IPC. Apart from that, there is no evidence at all on record to suggest that when the deceased sustained injuries by knives by A2 & A3 and the

deceased sustained injuries nos. 2 to 8, by the time he was dead. Much reliance has been placed on the deposition of PW1 by the defence that he admitted that after the gun shot injury, the deceased fell down and died. However, he does not say that when A2 & A3 caused injuries by knives at that time the deceased was dead. Therefore, the defence has failed to establish and prove that at the time when the deceased sustained injuries nos. 2 to 8 by the knives used by A2 & A3, he was dead.

13. It is also the case on behalf of the defence that according to the witnesses/eye-witnesses the weapon used was ‘dagger’ and not ‘knife’ and what is recovered is ‘knife’ and PW2 has subsequently improved his deposition that the other accused caused injuries by knives. It is the case on behalf of the defence that even the doctor in his cross-examination has stated that it is very doubtful to say that the injuries were by sharp cutting weapon on both sides. However, it is to be noted that the doctor answered the question which was put to him. One is required to consider the entire evidence as a whole with the other evidence on record. Mere one sentence here or there and that too to the question asked by the defence in the cross-examination cannot be considered stand alone. Even otherwise it is to be noted that what is stated by the Doctor/Medical officer can at the most be said to be his opinion. He is not the eye-witness to the incident. PW1

& PW2 have categorically stated that the other accused inflicted the blows by knives. The same is supported by the medical evidence and the deposition of PW2. Injuries nos. 2 to 8 are sufficient by the sharp cutting weapon. Injuries nos. 2 to 8 are on different parts of the body which show the intention and conduct on the part of the other accused A2 & A3. Therefore, they are rightly convicted for the offence punishable under Section 302 IPC with the aid of Section 34 IPC. Their presence and participation have been established and proved by the prosecution by examining PW1 & PW2 who are found to be reliable and trustworthy witnesses.

14. In the present case, the prosecution has been successful in proving the motive. There was a prior long-time enmity between the deceased and the accused – A1. Even the deceased was also facing trial for the offence under Section 307 IPC at the instance of A1. The defence has failed to prove any circumstances by which it can be said that they are falsely implicated in the case.

15. In view of the above and for the reasons stated above, no interference of this Court is called for. The learned trial Court and the High Court have rightly convicted the accused for the offence punishable under Section 302 r/w 34 of the IPC.

So far as A1 is concerned, there is a direct evidence against him using the gun and shooting the deceased. Therefore, even he

can be convicted for the offence punishable under Section 302 IPC, without the aid of Section 34 IPC. As observed hereinabove, both the courts below have rightly convicted A1 for the offence punishable under Section 302 IPC and other accused – A2 & A3 for the offence punishable under Section 302 IPC, with the aid of Section 34 IPC. Under the circumstances, the appeal fails and deserves to be dismissed and is accordingly dismissed.

…….J.
[Dr. Dhananjaya Y. Chandrachud]

New Delhi;
July 06, 2021.

…….J.
[M.R. Shah]