

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

1. Criminal Appeal No. 277 of 2003

KishorAppellant

Versus

StateRespondent

2. Criminal Appeal No. 296 of 2003

Tilwa @ Til Ram and anotherAppellants

Versus

StateRespondent

CORAM:

HON'BLE B.C. KANDPAL, J

HON'BLE NIRMAL YADAV, J.

Present: Mr. J.S. Virk, Advocate for the appellants

**Mr. S.S. Adhikari, A.G.A. for the
respondent-State**

(Per Hon'ble Nirmal Yadav, J.)

This order shall decide the above-mentioned two criminal appeals as both these appeals have arisen out of the same incident of crime and impugn the common judgment

of conviction and order of sentence dated 20.9.2003 passed by learned Additional District Judge, IInd Fast Track Court, Nainital. For facility of reference, the facts are noticed from Cr1. Appeal No.296 of 2003 filed by accused Tilwa @ Til Ram, etc.

Seven accused persons, namely, Tilwa @ Til Ram, Mohan, Tara, Kishor, Rajan @ Rajendra (sons of Bhagat Ram), Mohan Ram Tamta (son of Prem Ram) and Suresh (son of Madav Ram) were tried by the Additional District Judge, IInd Fast Track Court, Nainital for committing a double murder of Ram Parsad and Suresh (son of Kishan Ram) in a riverside fracas. Accused Tilwa @ Til Ram, Mohan and Kishor (sons of Bhagat Ram) stood trial for offences under Sections 148, 302/149, 323/149, 504 and 506 I.P.C., whereas, accused Tara, Rajan @ Rajendra, Suresh, and Mohan Ram Tamta were tried under Sections 147, 302/149, 323/149, 504 and 506 I.P.C. Accused Mohan and Tilwa @ Til Ram (sons of Bhagat Ram) were also tried under Section 4/25 of the Arms Act. The trial court held three accused Tilwa @ Til Ram, Mohan and Kishor (all sons of Bhagat Ram) guilty under Section 302/34 and 504 IPC and sentenced each of them to life imprisonment under Section 302/34 IPC and 6 months rigorous imprisonment under Section 504 IPC. Accused Kishor was also held guilty under Section 323 IPC and sentenced to rigorous imprisonment for 6 months and to pay fine of Rs.1000/- in default whereof to further undergo

imprisonment for six months. All the sentences were ordered to run concurrently. These three convicted accused were, however, acquitted of the charges under Section 148, 323/149 and 506 IPC, besides it, accused Tilwa @ Til Ram, Mohan were also acquitted of the charges framed against them under Sections 4/25 of the Arms Act while the remaining four accused Tara, Rajan @ Rajendra, Suresh and Mohan Ram Tamta were acquitted of all the charges levelled against them.

The prosecution case, in brief, is that on 10.3.2001, the day of Holi festival, at about 1.00 P.M. complainant Kishor along with his friends Roshan and Naresh had gone to river for bathing in the area of Village Shivnathpur. Meanwhile, all the seven accused Tilwa @ Til Ram, Mohan, Tara, Kishor, Rajan @ Rajendra (sons of Bhagat Ram), Mohan Ram Tamta (son of Prem Ram) and Suresh (son of Madav Ram) also came there for taking bath. All of them started hurling abuses at the complainant party. When complainant asked them not to do so, accused Kishor gave a slap on his face and accused Mohan started beating him with sticks. In the meantime, complainant's brother Ram Parsad and cousin Suresh, son of Kishan Ram, reached the spot to rescue him. At this juncture, accused Tilwa @ Til Ram, Mohan and Kishor, sons of Bhagat Ram, took out their knives and caused knife injuries to Suresh and Ram Parsad. When complainant and others raised alarm, the accused went

towards the village threatening that in case anyone raised voice against them, he would be killed. The incident was also witnessed by Janki Devi and Bhaguli Devi, wife of Mohan Ram. Many villagers also gathered at the place of occurrence. The complainant came back to the spot and found Suresh and Ram Parsad dead and their dead bodies were lying near the river. He reported the incident to Police Post, Maldhan, which was not a reporting chauki. However, the FIR was recorded at Police Station Ram Nagar on the same day at 3.30 P.M.

The Investigating Officer prepared the Panchnama and dead body was sent for post-mortem to the Government Hospital, Kashipur. Post-mortem was conducted on 11.3.2001. SI-Anant Ram, Investigating Officer arrested accused Mohan, Tilwa @ Til Ram, sons of Bhagat Ram and Mohan Ram Tamta son of Prem Ram. On their search, one knife each was recovered from the person of Mohan, and Tilwa @ Til Ram, which were taken in possession vide Exhibit Ka-22. Nothing was recovered from the person of Mohan Ram Tamta.

On completion of investigation, challan was presented in the court and accused were charged for the offences as mentioned in para-2 above. They pleaded not guilty and claimed trial.

The prosecution, in order to prove its case, produced as many as six witnesses. PW1-Roshan and PW2-Nareh were stated to be present at the time of occurrence along

with PW3-Kishor (complainant). Both the witnesses were declared hostile. PW4-Bhaguli Devi and PW5-Janki Devi are also eye-witnesses, but were declared hostile while PW6 SI-Anant Ram is the Investigating Officer of the case.

When examined under Section 313 Cr.P.C. all the accused denied the allegations levelled against them. According to them, they have been falsely implicated. They were arrested from their houses by the police officials. All the police officials have deposed against them on account of enmity. The trial Court after considering the circumstances and evidence on record, convicted, sentenced and acquitted the accused as detailed in para-2 above.

PW3-Kishor, at whose instance the first information report was lodged, is the sole eye-witness in this case. The post-mortem reports of both the deceased having been admitted, no doctor was produced to prove the same. Post-mortem report of deceased Ram Parsad was marked as Exhibit Ka-2 and that of deceased Suresh as Exhibit Ka-29. As per post-mortem reports, the deaths were caused one day prior to the post-mortem examination. The cause of death was on account of all the ante-mortem injuries. The following injuries were found on the person of deceased Ram Parsad:

- "1. Incised wound 2 cm x 1 cm x muscle deep on the right side neck base.

2. Incised wound 2 cm x 1 cm x chest cavity deep and on the front side of neck.
3. Incised wound 2 cm x 1 cm x muscle deep on right arm.
4. Incised wound 2 cm x 1 cm x muscle deep on right arm."

The following injuries were found on the dead body of Suresh: -

- "1. Incised wound 4 cm x 2 cm x muscle deep on the right side of chest.
2. Incised wound 4 cm x 2 cm x abdominal cavity deep on abdomen.
3. Incised wound 4 cm x 2 cm x abdominal cavity on abdomen.
4. Incised wound 2.5 cm x 1.5 cm x muscle deep on the backside of chest.
5. Incised wound 4 cm x 2 cm x chest deep on the back side of left chest.
6. Incised wound 5 cm x 2 cm x muscle deep on the back side of left shoulder."

We have heard learned counsel for the parties and with their assistance perused the entire material on record.

Learned counsel for the appellants vehemently argued that the prosecution case rests on the sole testimony of PW3-Kishor, who is the most interested witness

being real brother of deceased Ram Parsad. He further argued that his testimony has not been found to be completely trustworthy. He is found to be neither reliable nor unreliable, therefore, the conviction cannot be based only on his testimony. Learned counsel vehemently contended that the alleged recovery of knife from accused Mohan and Tilwa @ Til Ram has also not been accepted by the trial Court. It is, therefore, argued that there is no other cogent evidence to corroborate the statement of PW3-Kishor. Learned counsel drew our attention to the first information report and submitted that PW3-Kishor stated that Tilwa, Kishor and Mohan took out knives and caused injuries, however, while appearing in the court, he took a totally different stand and deposed that Tilwa, Rajan and Tara had caused injuries on the person of his brother Ram Parsad while Mohan, Suresh and Mohan Ram Tamta gave knife blows on the person of Suresh. He did not attribute any injury having been caused by accused Kishor to any of the deceased. Learned counsel, therefore, argued that since there are material contradictions in the statements made by PW3-Kishor, his testimony could not be accepted for the conviction of accused Tilwa @ Til Ram, Mohan and Kishor and they should also have been extended the benefit of doubt as is given to their co-accused Tara, Rajan @ Rajendra, Suresh and Mohan Ram Tamta. In support, learned counsel referred to a couple of Apex Court judgments reported as **Deepak**

Rajak vs. State of West Bengal, 2007(2) AAR 961 (SC) and Lallu Manjhi and another vs. State of Jharkhand, (2003) 2 Supreme Court Cases 401.

Learned counsel for the appellants argued that trial Court has relied on an unexhibited document in which injuries on the person of Mohan, son of Bhagat Ram have been mentioned. However, it was not put to accused Mohan, son of Bhagat Ram during his examination under Section 313 that he had received incised wound 2.5 cm x 1.5 cm x muscle deep red in colour on the inner side and on the base of left hypothorasic (*sic*) area of face, though the trial court has taken into consideration the said injury holding that the injuries on the person of Mohan proves his presence.

On the other hand, learned Government Advocate submitted that the testimony of the solitary witness can well be relied on to base the conviction of the accused persons. It is argued that presence of PW3-Kishor at the place of occurrence was natural. He had gone to river after the Holi festival was over around mid-day. Both Suresh and Ram Parsad had come to rescue the complainant while he was being given beatings by the accused persons. He further pointed out that even the medical evidence fully supports the testimony of PW3-Kishor. The fatal injuries have been

caused by knife and all the injuries found on the persons of Suresh and Ram Parkash are incised wounds.

It is true that the present case totally rests on the testimony of PW3-Kishor. His presence at the place of occurrence cannot be disputed. As per prosecution, the genesis of the occurrence started at the river in the afternoon of 10.3.2001 as complainant and accused persons had gone there for bathing. The accused started hurling abuses and giving beatings to the complainant. When Suresh and Ram Prasad came to his rescue, they were caused knife injuries by the accused persons.

A few facts may be taken note of. All the witnesses as well as accused belong to the same village and are related to one another. There cannot be any doubt with regard to the identity of the accused persons. The FIR was also promptly recorded. The occurrence took place around 1.00 P.M. and the FIR was lodged at 3.30 P.M. at Police Station Ram Nagar, which was at a distance of 35 kms. Since the brother of the deceased is the author of the FIR, he would not like the real culprits to go scot free. In our Indian Society, it may, however, be possible that complainant party implicates as many relatives of the opposite faction as possible by merely naming them in order to wreck vengeance or settle score of some personal vendetta. As regards, PW4-Bhaguli Devi and PW5-Janki Devi, it has come in the evidence that Bhaguli Devi is sister of

accused persons, whereas, PW5-Janki Devi is admitted to be neighbour of accused persons. She has also admitted that accused Tilwa @ Til Ram, Mohan and Kishor are her brothers-in-law (Devar). PW1-Roshan, is brother of PW4-Bhaguli Devi and is thereby also related to accused persons. Therefore, it is not surprising that they had not supported the prosecution case.

It was argued by learned counsel for the appellants that there was no motive on the part of the accused persons for committing murder of two persons. Although they have stated that some other litigation was pending between the parties, however, that has not been proved by any cogent evidence. Since there was no previous enmity between the parties, there was no reason as to why the complainant would falsely implicate the accused persons. Such being the position, the testimony of PW3-Kishor has rightly been accepted by the trial Court while convicting some of the accused and has fairly given the benefit of doubt to the other.

Learned counsel for the appellants vehemently argued that there are serious contradictions in the testimony of PW3-Kishor with regard to the role attributed to the accused persons. In the FIR, he has named Tilwa @ Til Ram, Mohan and Kishor as the persons who caused knife injuries to Suresh and Ram Parsad. However, in his statement before the Court, he has given a different

version with regard to the actual incident. While appearing as PW3 he stated that Tilwa, Rajan and Tara caused knife injuries to his brother Ram Prasad whereas, accused Mohan, Suresh and Mohan Tamta inflicted knife injuries to his cousin Suresh. He does not name accused Kishor for causing injuries to any of the deceased. This argument appears to have some force.

Having carefully scrutinized the contents of FIR and version given by PW3-Kishor before the Court, the complainant does not show any culpability qua accused Kishor, meaning thereby, the contents of the FIR qua the role attributed to accused Kishor are not supported by his substantive evidence before the Court. In such a situation, accused Kishor also deserves to be extended the benefit of doubt. It appears that there were so many accused and the occurrence having taken place in the course of a sudden quarrel, the complainant may not be in proper frame of mind while giving the first version of the incident. In view of this apparent contradiction in the statements of PW3-Kishor, it would be quite fair to extend benefit of doubt to accused Kishor as well. However, the testimony of PW3-Kishor cannot be discarded qua the other two convicted accused Tilwa @ Til Ram and Mohan, sons of Bhagat Ram, owing to the fact that his testimony also finds corroboration from the medical evidence, as 4-6 incised

wounds were found on the vital parts of the bodies of deceased Suresh and Ram Parsad.

In the result, Criminal Appeal No.296 of 2003 filed by accused Tilwa @ Til Ram and Mohan, sons of Bhagat Ram, is dismissed and conviction and sentence recorded against them is left undisturbed while Criminal Appeal No.277 of 2003 filed by accused-Kishor is allowed setting aside the conviction and sentence imposed upon him. He is directed to be set at liberty forthwith if not wanted in some other case. If he is on bail, his bail bonds shall be cancelled.

(Nirmal Yadav, J.)

(B.C. Kandpal, J.)

26.02.2010