

RESERVED JUDGMENT

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

(1) Criminal Appeal No.81 of 2010

1. Mohan Swaroop
2. Jagdish

... Appellants

Versus

State of Uttarakhand

... Respondent

(2) Criminal Appeal No.82 of 2010

Mohan Swaroop

... Appellant

Versus

State of Uttarakhand

... Respondent

Mr. Sandeep Tiwari, Advocate, for the appellants

Mr. Amit Bhatt, Dy. Adv. General (Crl.) for the State of Uttarakhand/respondent

Dated: June 28, 2013

Coram: Hon'ble Barin Ghosh, C.J.

Hon'ble Servesh Kumar Gupta, J.

Per: Hon'ble Servesh Kumar Gupta, J.

Both appeals, titled above, assail the judgment and order dated 09.04.2010 rendered by learned Sessions Judge, Udham Singh Nagar (Rudrapur) in S.T. Nos.292/2007 and 293/2007, whereby the accused/appellants Mohan Swaroop and Jagdish were directed to undergo rigorous imprisonment for life with fine of Rs.5,000/- each for having been found guilty u/s 302 IPC. Appellant/accused Mohan Swaroop was further sentenced to undergo one year's R.I. with fine of Rs.1,000/- for the offence of Section 4/25 of the Arms Act.

2. Smt. Seema and Smt. Savitri (co-accused persons though acquitted) are the wife and mother respectively of the

accused Mohan Swaroop, whereas accused Jagdish is his real brother. Deceased Tara Devi, an old lady of 60 years of age, was the real BUA (father's sister) of the appellants who was residing along with her husband Brij Lal in the nearby vicinity of accused.

3. The first information report was lodged by PW1 Smt. Bachan Kaur who was also living in the same vicinity. This incident occurred on 9.8.2007 at about 8:45 PM and the FIR was lodged just after one hour of the occurrence i.e. at 9:45 PM, having been scribed by Prem Shankar R/o Town Kichha. PW1 has averred in the report that accused/appellants were having an ill eye upon the house of Tara Devi (deceased) and were pressing her to transfer the ownership of house in their favour, to which she did not agree, which made the accused persons annoyed. Tara Devi had also disclosed this fact to Bachan Kaur. Since the deceased was apprehending threat to her life, the complainant used to sleep in Tara Devi's house in order to render a safety feeling to her. On the relevant date and time, when the complainant reached at the house of Tara Devi, she heard a moaning sound. The power supply was disrupted at the moment, so she switched on a torch inside the house and found that accused/appellant Jagdish had overpowered Tara Devi lying on a cot and accused Mohan Swaroop was stabbing knife on her neck. At the same time, Savitri Devi (mother of accused), standing on the stairs, was keeping surveillance on the passers-by. No sooner did the accused were highlighted in the torch light, they escaped from the spot pushing the complainant aside. An alarm was raised which attracted the attention of tenant Smt. Madhu W/o Mahendra from the roof of house. Smt. Madhu disclosed that at about 8:30 PM, when the accused/appellants entered the house, their mother Savitri took her forcibly on the roof and did not permit her to come down even at the disclosure that

her husband was to arrive soon. This way, Smt. Madhu was almost kept confined on the roof. Thereafter when the informant went inside the house, she found Tara Devi dead. Then she narrated the incident to scribe Prem Shanker (PW2) and thereafter submitted the report at the police station which is Ex.Ka-1, Chik report whereof is Ex.Ka-13.

4. The police came into motion and arrested the accused. On 29.8.2007, the knife, which was used in the commission of crime, was recovered at the instance of accused Mohan Swaroop, recovery memo whereof is Ex.A-10. Matter was investigated which culminated into submission of charge sheet against the accused persons. A separate chargesheet was also submitted against the appellant Mohan Swaroop for the offence of Section 4/25 of the Arms Act. Charge was levelled against the accused/appellants u/s 302/120-B IPC, as also against the co-accused Smt. Seema and Smt. Savitri u/s 302/34 and 120-B IPC.

5. To prove its case, prosecution has examined PW1 Smt. Bachan Kaur (complainant), PW2 Prem Shanker (scribe of FIR), PW3 Smt. Madhu (tenant of the same house, who has been declared hostile), PW4 Makhan Lal (before whom the I.O. had recovered the bloodstained string of the cot of deceased), PW5 Dr. L.S. Toliya (who conducted post-mortem), PW6 S.I. K.R. Arya (I.O. of the case), PW7 Constable Manohar Singh (before whom the accused Mohan Swaroop got discovered the knife), PW8 S.I. Sundaram Sharma (I.O. of the case u/s 4/25 Arms Act), PW9 H.C. Devnath (who prepared Chik FIR and made entry in GD) and PW10 Om Prakash (declared hostile). Thereafter the statements of accused were recorded u/s 313 Cr.P.C. The trial court, vide the judgment under appeal, convicted the accused/appellants, as afore-stated, and at the same time, acquitted the co-accused Smt. Savitri and Smt. Seema from all the charges levelled against them.

6. We have heard learned counsel for the parties and perused the material on record. Before going any further, we deem it proper to reproduce the ante-mortem injuries found on the person of deceased Tara Devi, whose post-mortem was conducted by PW5 Dr. L.S. Toliya, which are as under: -

- A. *“Incised wound 2 cm x 1 cm x 1 cm over right side of neck, margin clear cut*
- B. *Incised wound 12 cm x 3 cm x bone deep, front of neck extend from above left mid of clavicle to right side of neck. Margin clear-cut. On further exploration, cut of right and left both carotid arteries, great vessels of neck, trachea and esophagus, through and through.*

Cause of death was shock and hemorrhage due to ante-mortem injuries.”

7. Having considered the pros and cons of the instant appeal, we find that the finding of conviction, recorded by the trial court, is based upon the single testimony of PW1 Bachan Kaur. She states herself to be the eyewitness of the occurrence. She has deposed that on the relevant day, she went to sleep in the house of deceased in order to allay her apprehension to be harmed at the hands of accused. PW1 has admitted that at the time of incident, there was no electric light available and she has disclosed the manner of killing of Tara Devi by these accused/appellants in the manner, as afore-mentioned, in the light of torch, which she held in her hand. The accused persons, after noticing the presence of PW1, fled away pushing her aside. This story is somewhat doubtful, more so for the reason that PW1 herself has admitted a civil litigation launched by the accused persons against her as also against her husband. So, the relations between PW1 and the accused persons, though being neighbours, were not cordial and were full of animosity. In

this background, we have scrutinized rest of the evidence and found no corroboration to the testimony of PW1. Rather Smt. Madhu, who was the tenant in the same house, where the incident had occurred, has been examined as PW3 by the prosecution, but she has not supported the case and was declared hostile by the prosecution. PW3, in her examination-in-chief, has stated that at about 12 of the night, a crowd was assembled in the house of Tara Devi. Then she came to know that after killing Tara Devi, somebody had thrown her dead body outside the house, which was later on shifted inside the room by the persons, so assembled there. She has also denied of hearing any scream of the deceased. She also expressed her inability to say anything as to how deceased had died, but has only deposed to have seen the dead body of deceased, lying on the road.

8. Upon having a look on the Map, prepared by the Investigating Officer, there is only one cot shown in the room of Tara Devi, which also belies the version of PW1 that for last several days, she was sleeping in the side-by of cot with the deceased.

9. There is yet another significant aspect of the matter that husband of deceased Tara Devi, named Brij Lal, was alive and he was living in the same house, but he has not been examined by the prosecution for the reasons best known to it. Brij Lal only could have said something as regards the occurrence, if any, which took place in his house, but there is no explanation as to why such an important witness has been withheld.

10. Thus, in view of what has been stated above, we are not ready to accept the story, as put forth by the prosecution. We, therefore, allow both the appeals and at the same time, set aside the impugned judgment and order. Appellants

Mohan Swaroop and Jagdish are in jail. Let they be released forthwith if not wanted in any other case.

11. A copy of this judgment and order along with the lower court record be sent to the court concerned for compliance of the order.

(Servesch Kumar Gupta, J.) (Barin Ghosh, C.J.)
28.06.2013