

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.
Cr. Appeal No. 464 of 2009.
Reserved on: August 28, 2018.
Date of decision: 31.8.2018.

State of Himachal Pradesh

.....Appellant.

Versus

Arvind alias Shambhoo & anr.

.....Respondents/accused.

Coram

The Hon'ble Mr. Justice Dharam Chand Chaudhary, Judge.

The Hon'ble Mr. Justice Vivek Singh Thakur, Judge.

Whether approved for reporting?¹ Yes.

For the appellant	:	Mr. Narinder Guleria Addl. AG with Mr. Vikas Rathore, Addl. AG.
For the respondents	:	Mr. J.P. Sharma and Mr. Jagan Nath, Advocates.

Dharam Chand Chaudhary, J.

State of Himachal Pradesh aggrieved by the judgment dated 28.3.2009, passed by learned Addl. Sessions Judge, Una, District Una, H.P. in Sessions Trial No. 7 of 2007, whereby the respondents (hereinafter referred to as the accused) have been acquitted of the charge framed against each of them under Sections 307, 326, 324 IPC read with Section 34 IPC and under Section 25 of the Indian Arms Act, has preferred the present appeal for setting aside the same on the grounds inter alia that the evidence produced by the prosecution has not been appreciated in its right perspective and to the contrary, the findings recorded on the basis of conjectures

¹ *Whether the reporters of the local papers may be allowed to see the Judgment? yes.*

and surmises. There being no enmity of the prosecution witnesses with the accused who have deposed against them, their testimony has been ignored without assigning any reason. The testimony of injured witnesses Sunil Kumar (PW-1) and Bikram Jit Singh (PW-3) qua identification of the accused persons and that it is they who alone were the assailants, has also been erroneously ignored. Undue weightage to the statement of photographer that the photographs were taken on 10.5.2006 has been given while acquitting the accused of the charge.

2. The facts of the case, in a nut shell, are that PW-1 a salesman was present in a liquor vend at Jorbar Bhatehar on 9.5.2006. One Bikram Jit Singh (PW-3), who happens to be the brother-in-law of Ajnesh Kumar (PW-7), another salesman deployed in the liquor vend, had also come to meet him. Since Ajnesh Kumar (PW-7) was away to Hoshiarpur, therefore, Bikram Jit Singh (PW-3) stayed in the liquor vend with Sunil Kumar (PW-1). Around 11:30 PM, they both were sleeping outside the liquor vend. Both accused came there and told Sunil Kumar (PW-1) that they intend to purchase liquor and that they will come back after some time. It is around 1:30 AM (midnight) when both Sunil Kumar (PW-1) and Bikram Jit Singh (PW-3) were sleeping, the accused persons suddenly attacked them. Accused Arvind allegedly inflicted a knife blow on the chest of Sunil Kumar (PW-1) on left side whereas accused Brijesh inflicted darat blow on the person of Bikram Jit

Singh (PW-3). They raised hue and cry and both accused allegedly fled away from the spot. The injured went to Police Post Chintpurni. The statement of Sunil Kumar (PW-1) Ext. PW-1/A was recorded under Section 154 Cr.P.C. They both thereafter were taken to hospital at Chintpurni for treatment. The medical aid was given to them in the said Hospital and referred to Zonal Hospital Una for better management. In the Hospital at Una, X-rays were conducted.

3. On the same day i.e. 10.5.2006, the police visited the spot at about 4-5 PM. The site plan Ext. PW-20/E was prepared. The blood stained Shirt (white coloured) Ext.P-1 and bed sheet Ext. P-2 produced by Sunil Kumar (PW-1) were taken into possession vide memo Ext. PW-1/B and PW-1/C. During further course of investigation, one blood stained T-Shirt Ext. P-5 belonging to Bikram Jit Singh (PW-3) was also taken into possession on 23.5.2006.

4. Accused Arvind Kumar allegedly made a disclosure statement on 25.5.2006 and got recovered knife Ext. P-3 from the bushes at a distance of 65 feet away from the liquor vend, the same was taken into possession vide recovery memo Ext. PW-8/A. The map of that place Ext. PW-20/E was also prepared. The police had also taken into possession the documents of the vehicle bearing registration No. HP-36-7216 allegedly used by the accused at the time of commission of the offence vide recovery memo Ext. PW-5/A.

5. During the interrogation of accused Brijesh alias Bonnu, he made disclosure statement on 8.6.2006 Ext. PW-10/A in the

presence of witnesses that he could get recovered 'darat' (Ext. P-4). Consequently, the same was got recovered vide recovery memo Ext. PW-8/B which was sealed in a parcel and taken into possession. The spot map Ext. PW-20/L was also prepared.

6. On completion of the investigation, challan against both the accused was filed in the Court. The same on committal was received in Sessions Court at Una. Learned trial Judge on going through the record and hearing learned Public Prosecutor as well as learned defence counsel and on finding a prima facie case having been made out against the accused persons, proceeded to frame charge against both of them for the commission of the offence punishable under Sections 307, 326, 324 read with Section 34 IPC and under Section 25 of the Indian Arms Act. They, however, pleaded not guilty and claimed trial. Consequently, in order to sustain the charge so framed against the accused, the prosecution has produced the oral as well as documentary evidence.

7. The material prosecution witnesses are both the injured Sunil Kumar (PW-1) and Bikram Jit Singh (PW-3). PW-4 Jai Singh is another salesman who was working in the liquor vend with Sunil Kumar (PW-1). He, however, has not supported the prosecution case and turned hostile. PW-6 Hans Raj is a witness to the recovery of alleged blood stained T-Shirt and bed sheet (Ext. P-5) and (P-2), respectively, which were taken into possession vide recovery memo Ext. PW-3/A at the instance of injured witness Bikram Jit Singh

(PW-3). PW-8 Ajay Kumar is the witness to the recovery of knife (Ext. P-3) allegedly made at the instance of accused Arvind Kumar and taken into possession vide recovery memo Ext. PW-8/A. He is also a witness to the recovery of 'darat' (Ext. P-4) which was taken into possession vide recovery memo Ext. PW-8/B at the instance of accused Brijesh. PW-9 Des Raj is a witness to the recovery of car No. HP 36-7216, taken into possession by the police vide recovery memo Ext. PW-9/A. PW-10 Yashpal has been examined to prove the disclosure statement Ext. PW-10/A allegedly made by accused Brijesh Kumar and on the basis whereof, he allegedly got the 'darat' (Ext. P-4) recovered. PW-12 Vipin Kumar is running a Studio under the name and style of Sharma Studio at Jorbar. According to him, he took photographs Ext. PW-12/A to PW-12/D on 10.5.2006 and also proved the negatives thereof Ext. PW-12/E to PW-12/H.

8. PW-13 Om Prakash alias Chhaju Ram is a Tea vendor having his shop at a distance of 300 meters from the liquor vend. On 10.5.2006, when he was sleeping on the roof of his shop, heard the cries "मार दिया-मार दिया from the side of liquor vend. He woke up and replied that he is coming and when he reached on the spot, noticed that both injured were bleeding. He made woke up the other people and also arranged for a vehicle. The accused were brought to Police Post Chintpurni and taken to hospital. One more person was also with him. Both the injured disclosed that they have been attacked by some persons who have fled away.

9. PW-14 Sanjiv Kumar was posted as Radiographer at Regional Hospital, Una. He had conducted X-ray of injured persons vide X-ray films Ext. PW-14/A, PW-14/B and PW-14/C. Dr. O.P. Ramdev (PW-15) is a Radiologist and at the relevant time posted in RH Chintpurni. According to him, he examined the X-ray films and given his opinion Ext. PW-15/A and PW-15/B. There was no evidence of fracture.

10. PW-2 Dr. Parveen Kumar was the then Medical Officer, Civil Hospital, Chintpurni. As a matter of fact, it is he who had given medical first aid to both the injured at the instance of the police. He also issued MLC Ext. PW-2/B in respect of injured Sunil Kumar and Ext. PW-2/C in respect of injured Bikram Jit Singh. In his opinion, injuries on the person of Sunil Kumar (PW-1) could have been caused with knife (Ext. P-3) and the injuries on the person of Bikram Jit Singh (PW-3) with 'darat' (Ext. P-4). PW-5 Const. Ashok Kumar is official witness as in his presence the car was taken into possession vide memo Ext. PW-5/A. PW-11 HC Rajesh Kumar at the relevant time was posted as MHC in PS Amb. The case property was deposited with him, which he later on sent to FSL Junga through Const. Ashok Kumar (PW-5). PW-16 Const. Nardev Singh has proved the rapat rojnamcha Ext. PW-16/A whereas PW-17 HC Pawan Kumar, I.O. has partly investigated the case. PW-18 SI Om Prakash has registered the FIR Ext. PW-17/B on the receipt of rukka Ext. PW-17/A and also filed the police report in the Court.

11. PW-19 Dr. Rachpal Singh is a private practitioner at Hoshiarpur. According to him, Bikram Jit Singh (PW-3) was admitted in his hospital on 10.5.2006 and discharged on 11.5.2006 vide discharge slip Ext. PW-19/A. The injury due to fracture of nasal bone was grievous in nature. His opinion obtained by the police is stated to be Ext. PW-19/B. PW-20 ASI Vishwas Kumar was posted as Incharge PP Chintpurni, Distt. Una at the relevant time and he has conducted the investigation and is the main investigating officer in this case.

12. On the other hand, both the accused in their statements recorded under Section 313 Cr.P.C. have denied the incriminating circumstances put to them as wrong either being incorrect or for want of knowledge. They also expressed their ignorance as to why the witnesses have deposed falsely against them. They, however, opted for not producing any evidence in their defence.

13. Learned trial Judge on completion of trial and hearing prosecution as well as defence has arrived at a conclusion that the identity of the accused as assailants is not at all established and as no case was found to be made out against them and hence acquitted of the charge framed against each of them.

14. On hearing Mr. Narinder Guleria and Mr. Vikas Rathore, learned Addl. Advocate Generals for the appellant-State and S/Sh. J.P. Sharma, Jagan Nath Advocates, learned defence counsel as well as on going through the evidence available on record, the short

controversy which needs adjudication in the present appeal is as to whether irrespective of the identity of the accused persons being the assailants was satisfactorily proved on record, learned trial Court has misread and mis-appreciated the evidence and as a result thereof erroneously recorded the findings of acquittal against both the accused. In all fairness and in the ends of justice, the answer to this poser would be in negative for the reasons to be recorded hereinafter.

15. The statement under Section 154 Cr.P.C. Ext. PW-1/A of Sunil Kumar (PW-1) contains very first version of the prosecution case. The names of the accused as the assailants have not been disclosed in this document and rather it is recorded that someone came there and assaulted Sunil Kumar (PW-1) and Bikram Jit Singh (PW-3) sleeping outside the liquor vend. Interestingly enough, had the complainant Sunil Kumar (PW-1) been in the knowledge that the assailants were none else but the accused he would have disclosed their names in Ext. PW-1/A. Otherwise also, it was mid night being 1:30 AM and both the injured were sleeping. The alleged assault was sudden and according to Sunil Kumar (PW-1), the injuries were inflicted for about 2 minutes only. It is un-believable that a person who was sleeping and woke up when assaulted could have identified the assailants in two minutes and that too during night time. No doubt, Sunil Kumar (PW-1) while in the witness box as PW-1 has stated that it is the accused who alone were assailants and assaulted

him as well as Bikram Jit Singh (PW-3) during the night intervening 9/10.5.2006 at 1:30 AM, however, since their names have not been mentioned in the statement under Section 154 Cr.P.C. nor in a short duration of two minutes the assailants could have been identified during night hours, therefore, the statement so made by Sunil Kumar (PW-1) cannot be believed to be true by any stretch of imagination. The nickname of accused Arvind Kumar is Shambhoo, nothing to this effect has come on record. When cross-examined, he tells us that both the accused used to visit liquor vend earlier also, hence, were known to him by their nick names. According to him, their nick names were disclosed to the police, however, in the statement under Section 154 Cr.P.C. their names do not find mention and rather as per the statement so made, they were assaulted by someone. On the other hand, it is stated that he came to know about the real name of Shambhoo as Arvind when the said accused was in the police custody. When, as per his version, he had no enmity with the accused persons and there is nothing on record about the motive, in such peculiar circumstances it cannot be believed that the assailants were the accused alone and none else. Though the suggestion that at the time of their medical examination they were not in the knowledge of the names of assailants has been denied being wrong, however, as per the history given to the doctor and recorded so in the MLC, the injuries were inflicted to them by some unknown persons. The reference in this regard can be made to

the MLCs Ext. PW-2/B and PW-2/C. Therefore, had the names of the assailants been known to the injured, they would have disclosed the same to PW-2 Dr. Parveen Kumar at the time when subjected to medical examination.

16. Admittedly, the test identification parade was not got conducted by the police. The testimony of Bikram Jit Singh (PW-3) so far as identification of the accused being the assailants is not much relevant because they were not known to him. As per his version when assaulted he was not able to identify the assailants. In the same breath though it is stated that accused Brijesh is the same person who had assaulted him, however, on what basis he has stated so, learned Addl. Advocate General has failed to explain. He even did not disclose the number of maruti car being used by the accused persons at the time of occurrence. He was declared hostile. When cross examined by learned Public Prosecutor, it is stated that he did not disclose the registration number of the vehicle to the police nor any such statement was made by him. It is denied that the names of both the accused were known to him and rather he could over hear the name of one of the assailants as Bonnu uttered by Sunil Kumar (PW-1). He, therefore, has demolished the entire prosecution case.

17. Interestingly enough, PW-13 Om Prakash while in the witness box has stated that on hearing cries “ मार दिया मार दिया”, he rushed to the spot and noticed both the injured lying there in injured

condition. They revealed to this witness that some unknown person had attacked them and fled away. Therefore, if the assailants were the accused, the injured particularly Sunil Kumar (PW-1) who claims that they used to come to the liquor vend earlier also would have disclosed their names at the very first available opportunity to do so i.e. in his statement recorded under Section 154 Cr.P.C. Admittedly, the police has not got conducted the identification parade. It is, therefore, not at all established that the assailants were the accused alone and none else and as such Learned trial Judge has rightly held them not to be the same persons who assaulted injured Sunil Kumar (PW-1) and Bikram Jit Singh (PW-3).

16. True it is that as per the medical evidence, having come on record by way of testimony of PW-2 Dr. Parveen Kumar and PW-15 Dr. O.P. Ramdev, respectively, there were injuries on the persons of both Sunil Kumar (PW-1) and Bikram Jit Singh (PW-3). The injuries in the opinion of PW-2 Dr. Parveen Kumar could have been caused with knife (Ext. P-3) and 'darat' (Ext. P-4). It is, however, not proved beyond all reasonable doubt that the injuries to them were inflicted by the accused persons alone. The story qua recovery of knife at the instance of accused Arvind whereas 'darat' at the instance of his co-accused Brijesh Kumar, also does not inspire any confidence for the reason that in a normal course, the accused after commission of the offence would have not thrown the weapon of offence nearby the spot i.e. at a distance of 65 feet. The remaining

evidence produced by the prosecution also need not be discussed for the reason that the prosecution has miserably failed to prove the identity of the accused to be the assailants and also to connect them with the commission of the offence they allegedly committed.

17. For all the reasons hereinabove, this appeal fails and the same is accordingly dismissed. Consequently, the personal bonds furnished by the accused shall stand cancelled and surety discharged. The appeal is accordingly disposed of.

**(Dharam Chand Chaudhary),
Judge.**

**(Vivek Singh Thakur),
Judge.**

August 31, 2018.

(karan-)