

Reserved on : 20.02.2020

Delivered on : 30.04.2020

CRIMINAL APPEAL No. 50 of 1986

Paras Nath

-----Appellant

Vs

State of Uttar Pradesh

-----Respondent

For Appellant : Sri K.N. Tripathi (Amicus Curiae)

For Respondent/State : Sri Amit Kumar Singh, AGA

Hon'ble Raj Beer Singh, J.

1. This appeal has been preferred against judgment and order dated 20.12.1985 passed by Vth Additional District and Sessions Judge, Allahabad in Session Trial No. 245 of 1983, under Section 436 IPC, P.S. Colonelganj, District Allahabad, whereby the accused-appellant Paras Nath has been convicted under Section 436 IPC and sentenced to three years rigorous imprisonment along with fine of Rs. 1000/-. In default of payment of fine he has to undergo one month rigorous imprisonment.

2. Prosecution version is that on 01.10.1981 at around 8:00 PM, accused-appellant has thrown a fire cinder at wooden hut of complainant from roof of his house and exhorted that he would burn the hut of complainant. Consequently, hut of complainant started burning, however, one Lakhan Lal Shukla and Brahma Prakash Shukla and some other persons extinguished the fire.

3. Complainant reported the matter to police by filing tehrir Ex. Ka-1 and consequently this case was registered on 01.10.1981 at 21:30 hours under Section 436 IPC against accused appellant Paras Nath Shukla vide FIR Ex. Ka-2. Investigation was taken up by PW-4 Head Constable Jai Ram Singh Chauhan. During the course of

investigation, ashes of burnt hut were taken into possession vide seizure memo Ex. Ka.5. Site plan Ex. Ka.4 was prepared and after completion of investigation accused-appellant was charge-sheeted for offence under Section 436 IPC.

4. Learned trial Court framed charge under Section 436 IPC. In order to bring home the guilt of accused-appellant, prosecution has examined five witnesses. After prosecution evidence, accused was examined under Section 313 of Cr.P.C., wherein, he has denied the prosecution evidence and claimed false implication. In defence, he has examined one Raja Ram Upadhyay as DW-1 and certain documents were filed vide List 42-B.

5. After hearing and analyzing the evidence on record, accused-appellant Paras Nath was convicted under Section 436 IPC and sentenced as stated in paragraph no.1 of this judgment.

6. Being aggrieved by the impugned judgment, accused-appellant has preferred the present appeal.

7. Heard Sri K.N. Tripathi learned Amicus Curiae for the appellant and Sri Amit Kumar Singh, learned A.G.A for the State and perused the record.

8. Learned Amicus Curiae for the appellant has submitted:

- (i) that version of PW-1 Harihara Nand Shukla, PW-2 Lakhan Lal Shukla and PW-3 Vijay Krishna, is not reliable and that their statements are suffering from various contradictions and infirmities, which indicate that they have not witnessed the alleged incident.
- (ii) that the prosecution version that while throwing fire cinder at hut of complainant, accused-appellant has made exhortation to burn hut of complainant, is improbable. It was stated that in such incident it cannot

be believed that accused himself would disclose that he is throwing fire cinder at hut of complainant.

- (iii) that prosecution case does not fulfills the ingredients of Section 436 IPC. There is no evidence that alleged hut was being used as human dwelling or as a place for custody of property. There is no evidence that how much part of said hut has been burnt, rather it appears that only a small part of alleged hut was burnt and thus, it cannot be said that accused-appellant has intention or knowledge that it was likely to cause destruction of any building.
- (iv) that the alleged incident was shown of 01.10.1981 and since then period of about 38 years has passed and that applicant has remained in custody for some days and thus, leniency may be shown in sentence.

9. Per contra, it has been submitted by learned State counsel that statement of complainant/PW-1 Harihara Nand Shukla is clear and cogent and that it has been corroborated by PW-2 Lakhan Lal Shukla and PW-3 Vijay Krishna. All these witnesses have been subjected to cross-examination but no adverse fact could emerge. There are no reasons as to why these witnesses would depose falsely against accused-appellant and no major contradiction in the testimony of witnesses could be shown. The Investigating Officer has seized ashes of burnt hut, which further supports the prosecution case. It has been submitted that conviction of accused-appellant is based on evidence and it calls for no interference.

10. I have considered the rival submissions and perused the record.

11. In evidence complainant/PW-1 Harihara Nand Shukla stated that on 01.10.1981 at 8:00 PM while he was present at well near platform of his house and Lakhan Lal Shukla, Rajendra Prasad and Vijay Krishna Shukla were also present there, accused appellant Paras Nath Shukla has thrown

a semi burnt fire cinder at his wooden hut from his house. This hut is being used for tying animals as well to keep agricultural tools. Due to cinder, the hut started burning. PW-1 further stated that accused-appellant Paras Nath has exhorted that he would burn the hut of complainant. It has been further submitted that a case under Section 151 Cr.P.C. was pending between the parties and that on 30.09.1981 Paras Nath was granted bail in that case. Accused appellant has a double barrel licensed gun and he has threatened to kill the complainant. PW-1 Harihara Nand Shukla has stated that due to mischief of accused-appellant, he has suffered loss of Rs. 400-500 rupees.

12. PW-2 Lakhan Lal Shukla has stated that on 01.10.1981 at 8:00 PM he, along with Vijay Kirshna, Harihara Nand Shukla, Brahma Prakash, Rajendra Prasad and some other persons, was present near platform of house of complainant. He saw that accused-appellant has thrown a semi burnt fire cinder at hut of Ram Chandra and exhorted to burn his hut resultantly hut started burning and they have extinguished the fire by pouring water but half of the hut has been burnt.

13. PW-3 Vijay Krishna has stated that on 01.10.1981 at 8:00 PM he was present near well, where Brahma Prakash and Lakhan Lal Shukla and some other persons were also sitting. Accused-appellant Paras Nath exhorted from roof of his house that he would burn the hut of Ram Chandra and he has thrown a semi burnt fire cinder at wooden hut of Ram Chandra resultantly the hut started burning. This hut was being used to tie animals. PW-3 Vijay Krishna further stated that they have extinguished the fire by pouring water, but the fire has resulted into loss of Rs. 500.

14. PW-4 Head Constable Jain Singh has recorded FIR.

15. PW-5 S.I. Raja Ram Singh has investigated the case. He has prepared site plan of spot and the burnt ashes was taken into possession. After completion of investigation he has submitted charge-sheet Ex. Ka.6.

16. DW-1 Raja Ram Upadhayay stated that he is a practicing advocate at Civil Court Allahabad. In Civil Suit No. 833 of 1981 Paras Nath vs. Ram Chandra and others, he was appointed Commissioner by the Court and as per order of the Court, on 30.09.1981 at 5:30 PM he has visited Mauja Salori and spot of incident. At that time S.I. S.K. Mishra and some other police officials were sitting near well. He has served a notice on Harihara Nand Shukla.

17. Close scrutiny of evidence shows that PW-1 Harihara Nand Shukla has made clear and consistent statement that it was accused-appellant Paras Nath, who has thrown semi burnt fire cinder at his hut and resultantly hut has sustained fire and it has caused loss of Rs. 400-500. He has been subjected to lengthy cross-examination but no such material fact could emerge, so as to affect his credibility. Though, it is apparent from record that there was enmity between the parties and litigation going on, however, it is well settled that enmity is a double edged weapon and it cuts both ways. On the one hand, it may be a motive for causing such incident, whereas on the other, it may be a reason for false implication. But the fact remains that prosecution version that in alleged incident wooden hut has sustained fire, is supported by cogent evidence. It has been clearly stated by PW-1 Harihara Nand Shukla that accused-appellant has thrown semi burnt fire cinder at his wooden hut from his roof. Mere minor contradictions and improvements cannot be a ground to disbelieve the testimony of this witness. Further, the version of PW-1 Harihara Nand Shukla has been amply corroborated by PW-2 Lakhan Lal Shukla.

18. It is correct that PW-2 has stated in his cross-examination that his house is situated at about half kilometers from spot but in villages it is not uncommon that in evening or till 8:00-9:00 PM several village persons often assemble and sit together. PW-2 Lakhan Lal Shukla appears an independent witness. Considering statement of PW-2 Lakhan Lal Shukla in it's entirety, it appears quite reliable.

19. So far as PW-3 Vijay Krishna is concerned, it may be stated that he has admitted in his cross-examination that his statement was recorded by the Investigating Officer on 30.12.1981, whereas alleged incident has taken place on 01.10.1981. He was also not shown as a witness in FIR. In his cross examination he was asked about several facts in his statement under Section 161 Cr.P.C., but he has stated that he does not remember whether he has stated any such fact before Investigating Officer or not. It would also be pertinent to mention that as per PW-2 Lakhan Lal Shukla, only half hut has been burnt whereas PW-3 Vijay Krishna has stated that whole hut has been burnt. In view of all these facts, it would not be safe to rely the statement of PW-3 Vijay Krishna.

20. Even leaving aside statement of PW-3 Vijay Krishna, it is apparent that version of PW-1 Harihara Nand Shukla has been amply corroborated by PW-2 Lakhan Lal Shukla. No major contradiction or infirmity could be pointed out in their statements. It is well settled that it is not the quantity of evidence but the quality of evidence, which matters. Considering entire facts and evidence on record, it is established that accused-appellant has thrown fire cinder at wooden hut of Ram Chandra and resultantly the wooden hut was damaged by fire. There is no force in contention of learned counsel that statement of PW-1 and PW-2 are not reliable and that there are major contradictions or inconsistencies.

21. However, so far as this contention is concerned, that mischief of accused-appellant does not fall within the ambit of Section 436 IPC, it has force. It may be observed that in first information report there was absolutely no such version that alleged hut was being used as a dwelling place or to keep any property. There is nothing to indicate that there was any door in the said hut, which may indicate that it was being used for keeping any property. Though, in his evidence, PW-1 Harihara Nand Shukla has stated that this hut was being used for tying animals and to keep agricultural tools but there is nothing to indicate that at the time of

incident there was any animal or tools inside the said hut. Further, PW-2 Lakhan Lal Shukla has not made any such statement that this hut was being used for tying animals or for keeping agricultural tools. Thus, bald statement of PW-1 that this hut was used for tying animals or for keeping animals is neither corroborated by PW-2 nor it is consistent with first information report. One other fact to be noticed is that the alleged fire was extinguished immediately. PW-1 and PW-2 have clearly stated that when alleged semi burnt fire cinder was thrown and accused has exhorted that he would burn the hut of Ram Chandra, they have extinguished the fire by pouring water. Though, PW-2 Lakhan Lal Shukla has stated that about half of the hut has been burnt but site plan of spot does not indicate that half of the hut was burnt. Investigating Officer has also not stated that how much part of alleged hut was found burnt. In charge-sheet it was stated that no loss was caused to the hut as fire was extinguished immediately. In view of such facts and circumstances, it cannot be concluded that alleged mischief of fire by accused-appellant was done with intention or knowing that it was likely to cause destruction of any building which is used as a human dwelling or as a place for custody of property. In view of these facts and circumstances, no offence under Section 436 IPC is made out. However, since it has been established that accused-appellant has caused damage to the hut of Ram Chandra by fire and that said damage cannot be said of less than Rs. 100/- and thus, his act falls within the ambit of Section 435 IPC. In view of the aforesaid, conviction of accused-appellant is liable to be converted from Section 436 IPC to Section 435 IPC.

22. So far as question of sentence is concerned, it has been argued by learned Amicus Curiae that after the alleged incident period of more than 38 years has passed and that in alleged incident only a little part of hut was burnt and that the said hut was not used for custody of any property or animal. The appellant is not a previous convict. Learned Amicus Curiae further submitted that in view of age mentioned in statement

recorded under Section 313 Cr.P.C., now the appellant is 70 years old person. It was submitted by the learned Amicus Curiae that as per statement of Investigating Officer accused-appellant was arrested in this case on 30.01.1982 but since this appeal is quite old and it is not clear from record that on which date he has been released on bail however, as he was arrested in a serious non bailable offence, thus, he might have remained in custody for sufficiently long time. It was further submitted that considering all aspects of the matter, it would not be appropriate to send the appellant in judicial custody at this stage.

23. It is well settled principle that sentence must be just and simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive. The concept of proportionality allows a significant discretion to the court but the same has to be guided by certain principles. In certain cases, the nature of culpability, the antecedents of the accused, the factum of age, the potentiality of the convict to become a criminal in future, capability of his reformation and to lead an acceptable life in the prevalent milieu, the effect - propensity to become a social threat or nuisance, and sometimes lapse of time in the commission of the crime and his conduct in the interregnum bearing in mind the nature of the offence, the relationship between the parties and attractability of the doctrine of bringing the convict to the value based social mainstream may be the guiding factors. Needless to emphasize, these are certain illustrative aspects put forth in a condensed manner.

24. It has been observed by the Hon'ble Apex Court that there can neither be a straitjacket formula nor a solvable theory in mathematical exactitude. It would be dependent on the facts of the case and rationalised judicial discretion. Neither the personal perception of a Judge nor self

adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a court. The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors which we have indicated hereinbefore and also have been stated in a number of pronouncements by this Court. On such touchstone, the sentences are to be imposed. The discretion should not be in the realm of fancy. It should be embedded in the conceptual essence of just punishment. A court, while imposing sentence, has to keep in view the various complex matters in mind. In respect of certain offences, sentence can be reduced by giving adequate special reasons but the special reasons have to rest on real special circumstances. (Vide *Gopal Singh v. State of Uttarakhand* (2013) 7 SCC 545).

25. Considering aforesaid legal position, in the instant case, it may be seen that now appellant-accused is aged about 70 years and that in alleged mischief by fire, no substantial damage has taken place. The accused appellant is not a previous convict. After alleged incident a period of about 38 years has passed and accused-appellant alone cannot be held responsible for this delay in disposal of appeal. Considering all aspects of the matter it would not be appropriate to send the accused appellant to jail at this stage and it appears that ends of justice would met if accused-appellant is sentenced to the period already undergone along with some substantial amount of fine. Accordingly, conviction of accused-appellant Paras Nath is altered from Section 436 IPC to Section 435 IPC and he is sentenced to the period already undergone by him along with fine of Rs. 5000/-. Accused appellant is on bail. He is directed to deposit the amount of fine within 45 days from today before the trial Court. In default of payment of fine, accused-appellant has to undergo six months imprisonment.

26. Appeal is partly allowed in above terms.

27. This Court appreciate the assistance rendered by Sri K.N. Tripathi, learned Amicus Curiae. He shall get remuneration from High Court Legal Service Authority as per rules.

28. Copy of this judgment be transmitted to the court concerned for information and necessary compliance.

Date: 30.04.2020

A. Tripathi

(Raj Beer Singh, J)