



**IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 1223 OF 2022

ASHOK UPADHYAY AND ANR.

...APPELLANTS

VERSUS

THE STATE OF BIHAR

...RESPONDENT(S)

J U D G M E N T

K. VINOD CHANDRAN, J.

The prosecution case was of a murder by gunshot injury. There were five accused arrayed, out of which, three were acquitted and two convicted; the convicts are the appellants before us.

2. Pursuant to a dispute regarding blockage of drainage, resulting in waterlogging in front of the house of the deceased, a quarrel erupted and the two families entered into a brawl, in which A2 was accused of shooting the deceased, while A1 fired at the other family members, injuring them. The prosecution examined twelve witnesses and the defence three. The conviction under Section 302 read with Section 34 of Indian

Penal Code, 1860¹ and Section 27 of the Arms Act, 1959, as also the sentence handed down, were affirmed by the High Court; which judgment is assailed before us.

3. That there was a homicide, is unequivocally proved from the medical evidence; which we will discuss a bit later since it has ramifications insofar as the presence of the eyewitnesses at the scene of occurrence. A motive was alleged of the blockage of drain, which was spoken by the related witnesses and even the independent witness, PW4, a neighbour.

4. As per the prosecution case, the accused came to the house of the deceased who was bathing his buffalo, a quarrel erupted when one of the accused exhorted the killing and A2 fired a shot at the deceased, killing him instantaneously. The body is said to have been carried to the police station, as is indicated in the First Information Statement (FIS) recorded from one of the sons of the deceased, PW10. In the FIS the incident is narrated, of the five accused coming to the house of the deceased and pursuant to a quarrel, on exhortation by one of them, A2 having shot the deceased on the left side of the chest and the others having assaulted the witnesses with *lathis* and A1

¹ In short 'IPC'

having shot at the women and children. It was stated by the informant that his brothers PW2 and PW3 also witnessed the incident and so did the villagers who converged on the scene of occurrence on hearing the altercation. The FIS did not speak of the presence of PW5 and PW6, allegedly injured witness and PW8, an independent witness.

5. The prosecution came with direct evidence of eyewitnesses, all of whom were close relatives of the deceased and staying in the same house. Despite villagers having converged at the point, none of them were proffered as an eyewitness. PW2, though, spoke of the incident as an eyewitness, according to him, the body of his father was taken from the place of occurrence to the hospital, as stated in cross-examination; contrary to what was stated by the first informant. In this context, we must notice that one of the defence witnesses stated that he saw the body lying on the roadside and there was Naxal-activity in the area. We must consider this deposition with the factum of the sons having taken the body to the police station from the scene of occurrence. There is no reconnaissance made of the scene of occurrence by the Police, and nothing has been recovered from the scene of occurrence.

The blood stained clothes of the relatives of the deceased were also not seized and sent for medical examination.

6. Be that as it may, PW1, a nephew of the deceased who was also witness to the inquest report, spoke of having seen the dead body in the police station. PW3, another son, narrated the incident in the same manner as PW2. While PW4, a neighbour, did not see the incident and spoke of having come to the scene of occurrence immediately after the shot was fired. PW5, daughter of the victim also spoke in consonance with the testimony of her brothers as to the incident. However, in cross-examination, many of the statements made by her in chief examination was confronted as not having been stated before the Police in her Section 161 statement. Her presence, hence, is doubtful and her case was that she had hugged her father after he fell and her clothes were blood stained. She also spoke of having gone to the hospital directly where she remained an inpatient, overnight.

7. PW6 was the daughter-in-law of the deceased who too deposed as an eyewitness. In addition, she spoke of the pellets having hit her and her two and half year-old child. As in the case of PW5, many of her statements, including the pellets having hit her and her child, were not disclosed to the Police at the time of

recording the statement under Section 161, CrPC. In fact, her statement under Section 161 was that A2 fired two shots, one of which hit her on the head. She too went to the hospital and spoke of having remained there overnight, as an inpatient.

8. PW8 is a person from the nearby village who spoke of having witnessed the incident while coming back with PW2. Immediately, we must notice that PW2 does not speak of PW8 having accompanied him back to his house. PW8 in addition to the eyewitness testimony spoke of A1 having shot the wife and daughter of the deceased and beating a female child with the butt of a gun. Many contradictions were confronted from the Section 161 statements one of which was that he had come to the scene of occurrence after hearing the shots. PW9 turned hostile and PW10, the first informant spoke in accordance with his statement and informed that the body was taken to the police station.

9. PW12 is the Investigating Officer (I.O), whose testimony discloses no effective investigation having been conducted. The arrest of one of the accused was made from a different police station, where he surrendered and the other accused, surrendered before Court. But for speaking of writing to the Superintendent of Police, to cancel the licence of the gun

issued to one of the accused, nothing is produced to indicate one of the accused having a licence for a gun. A rod is said to have been recovered from the house of A1 which is allegedly used for cleaning the barrel of the gun. This was never produced in Court or brought in evidence. There was no attempt to take the accused into custody and carry out recoveries. More importantly, though PW10 speaks of having visited the scene of occurrence on the very same night, he did not even prepare a map of the scene of occurrence to bring out various aspects, substantiating the testimony of the eyewitnesses, including the handpump, buffalo shed or the distance of the house from the scene of occurrence and so on and so forth; all crucial corroboration for the eyewitness testimony. As far as the recovery of blood stains, the I.O had explained that it was raining heavily and there was no telltale signs found on the scene of occurrence. It is his testimony that the statements of PW5 and PW6 were taken on 25.08.2003 which is the second day from the incident. Various contradictions in the Section 161 statements, as put to the eye-witnesses were put to the I.O which was affirmed. There were contradictions with respect to the statements made by PW2, PW3, PW5, PW6 and PW8.

10. Now, we come to the medical evidence, both, PW11, the Doctor who conducted the postmortem and PW7, the Doctor who examined the injured eyewitness, PW5, PW6 and PW10. The Doctor who conducted the postmortem, PW11, speaks of a gunshot injury; as the second injury found on the body of the deceased. He also deposed that distorted pellets and a cover of the cartridge was recovered from the body.

11. In fact, it was the PW11's testimony that a person of the age and health of the deceased, could survive for 3 to 6 hours with an injury sustained in the nature of injury No.2, the gun shot injury. The injury was deposed as having been caused within 24 hours and the postmortem was conducted at 09:15 am. The Doctor could not say as to whether the injury was caused by a pistol or by a gun. The expert opinion regarding the survival of a person who had sustained injury No.2 and the testimony that the injury could have been caused within 24 hours assumes relevance when we consider the defence evidence.

12. PW7, the Doctor who examined PW5, PW6 and PW10 spoke of only simple injuries having been caused of abrasions, but in the case of PW5, an incised injury and in the case of PW6, a firearm injury. However, PW7 also clarified that he was not sure whether the incised wound could be caused with the butt

of a gun or the injury sustained by PW6 was a firearm injury. The injuries as spoken of in the testimony was not found on the eyewitnesses. PW5 and PW6 were not stated to have been treated as in-patients and PW6's child was not shown to have sustained any injuries, as the witnesses deposed.

13. The injuries sustained do not inspire a finding as to the persons having been involved in an altercation where assault was made by *lathis* and multiple shots fired from a firearm. It also has to be noticed that the eyewitnesses were PW2, PW3 and PW10; who were the sons of the deceased, as also PW5; his daughter and PW6; his daughter-in-law. We already found that the evidence of PW5 & PW6, especially after the contradictions marked from the Section 161 statements does not inspire confidence to find their presence at the scene of occurrence. The testimonies of PW2, PW3 and PW10 also must be tested with the other attendant circumstances. The eyewitnesses have not stated in one voice as to where the dead body was taken. PW10 categorically stated that the dead body was taken to the police station and not the hospital while some others, including PW2 spoke of the body having been taken to the hospital. The inquest report and the testimony of I.O clearly indicate that the body was taken to the police station. PW6 in her testimony

states that her father-in-law had not died immediately, and she could feel his pulse when he was taken from the scene of occurrence.

14. It is surprising that the body was taken to the police station while in the normal circumstances it would have been taken to the hospital. Here we again notice the testimony of the Doctor who conducted the postmortem, that the injury which led to the death of the deceased could not result in an instantaneous death and the person who sustained it, could survive for 3 to 6 hours.

15. In this context, the defence testimony must be evaluated. The defence examined three witnesses, two of whom are inconsequential. In the normal circumstances, we would have discarded DW1's evidence also but coupled with the circumstances of the case and the discrepancies coming out from the eyewitnesses' testimonies, we cannot but notice it.

16. DW1 is a person from the adjacent village, who was on his way, to his sister's matrimonial house to inquire about his ailing sister; on the fateful day. On the way, at night, he heard shouts and gunshots, upon which he aimed the torch light at the place from which the sound emanated. He is said to have seen

a man lying prostrate with few carrying *lathis* and guns

surrounding him. They were shouting slogans of *Inqilab Zindabad*. The assailants turned on him and questioned him, when he felt threatened and he fled from the spot.

17. We narrated the testimony of this witness only to again emphasize the suspicious conduct, of the dead body having been taken to the police station and the expert opinion of the Doctor who conducted the post-mortem that the person who suffered the wound, which turned fatal, could have survived for 3-6 hours. Coupled with this, is the fact that there is nothing recovered from the scene of occurrence, though explained as due to the heavy rains. Not even the map of scene of occurrence was prepared by the I.O. The weapons of assault, the gun and the pistol remained elusive. No attempt was made to recover or seize it, nor was even the license produced to show one of the accused having a licensed firearm. The nature of the licensed firearm would have been evident from the license, and it could have led to forensic examination of the cover of the cartridge, which was recovered from the dead body, whether it matches the type of gun for which the license was issued.

18. More pertinently, the eyewitnesses speak of A1 carrying a '*licensed*' weapon and A2 carrying a pistol. On the mere sight of a weapon, it cannot be identified as one licensed. We

pertinently observe that, this smacks of premeditation to frame the accused, who is known to have a licensed weapon. But unfortunately, the I.O did nothing to produce the license and prove at least that the accused had access to such a weapon. The circumstances, as we see, do not lead solely to the hypothesis of guilt and a lingering doubt, quite reasonable in the facts and circumstances brought out by the prosecution itself, that there could be a hypothesis of innocence. ***Sharad Birdhichand Sarda v. State of Maharashtra***², speaks of such hypothesis of innocence, if available, restraining the court from entering a conviction.

19. True, the said theory was propounded and followed in cases of purely circumstantial evidence. In the present case, there was direct evidence proffered by the prosecution insofar as the eyewitnesses are concerned. However, we must emphasize that the majority of the eyewitnesses were close relatives; PW2, PW3, PW5, PW6 and PW10. We have already found that, though, the narration of the incident, more or less tallied, there are discrepancies and circumstances, which persuade us not to place an unflinching reliance on those

² (1984) 4 SCC 116

testimonies. Related witnesses merely for their relationship with the deceased cannot be called interested witnesses. But when, from the circumstances, as in the present case, where there is found a ring of falsity in their testimonies, a closer scrutiny is warranted. If the incident occurred at the front yard of the house, then the related witnesses are not chance witnesses and could be relied on. But there is no clear substantiation in this case, as to the scene of occurrence. The independent witness PW8, though, spoke of having accompanied PW2, there was no corroboration on that aspect by PW2, making him also a doubtful eyewitness.

20. Due to the discrepancies and the inconsistencies, we are unable to place faith on the oral testimony of eyewitnesses. In that circumstance, the reasonable doubt regarding a hypothesis of innocence assumes relevance. We must emphasize that despite specific overt acts alleged on the other accused, the Trial Court acquitted them, affirmed by the High Court.

21. In the totality of the circumstances, we are persuaded to give the appellants herein the benefit of doubt and, hence, we acquit them.

22. The appellants shall be released from custody forthwith if they are remaining in custody and if not required in any other case. If they are on bail, their bail bonds shall stand cancelled.

23. The criminal appeal is allowed.

24. Pending application(s), if any, shall stand rejected.

..... J.
(J. B. PARDIWALA)

..... J.
(K. VINOD CHANDRAN)

**NEW DELHI;
SEPTEMBER 08, 2026.**