

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.2203 of 2010

Radhey Shyam & Ors.Appellants

Versus

State of RajasthanRespondent

J U D G M E N T

Abhay S. Oka, J.

FACTUAL ASPECTS

1. The appeal is by accused nos.9, 2 and 1 respectively, who have been convicted for the offences punishable under Section 148 and Section 302 r/w Section 149 of the Indian Penal Code (IPC). There were 29 accused named in the charge sheet, out of which accused nos.1, 2, 5, 7, 9, 15, 17 and 20 were convicted by the Sessions Court and the remaining 21 were acquitted. By the impugned

judgment, the High Court has upheld the conviction of the appellants.

2. There was a political rivalry between the family of the deceased Raghunath Singh and some of the accused persons who belong to the Ahir community and who had formed a party known as Azad party. The incident is of 16th April 1976. PW-6 Shiv Raj Singh, who is the brother of the deceased Raghunath Singh, lodged First Information Report (FIR). A group of Ahirs attacked the deceased. According to the prosecution case, PW nos.2, 3 and 4 were the eyewitnesses. The Trial Court discarded the testimony of PW-2 but believed the testimony of PW-3 Krishna, the minor, who was the daughter of the deceased, and PW-4 Kanwarbai, who is the mother of the deceased.

CONTENTIONS OF THE PARTIES

3. The learned counsel appearing for the appellants submitted that PW-3 is a child witness whose evidence is required to be scanned very cautiously. Inviting our attention to the evidence of PW-3 Krishna and, in particular, her cross-examination, she submitted that her testimony cannot be held to be reliable, particularly when the

identification of the accused made by the witness in the Court is highly doubtful. Moreover, PW-4 could not identify a single accused in the Court and, therefore, it was unsafe to rely upon her testimony. She also pointed out that there was a delay of 3 days in sending the FIR to the learned Magistrate. There was a political rivalry between the family of the deceased and the political party to which the accused belonged and, therefore, during the period of these three days, false implication of the accused must have taken place.

4. Learned senior counsel representing the State urged that perusal of the answers given to the preliminary questions put to the child witness (PW-3) shows that the witness had good intelligence and understanding. He submitted that though she correctly identified the accused no.1 as the son of Ramchander, by mistake she mentioned the name of Modu (acquitted accused), who was also the son of one Ramchander. He submitted that this is a minor discrepancy which is not sufficient to discredit the version of PW-3. He submitted that PW-4 Kanwarbai named five persons as the accused. He submitted that PW-4 was not able to identify the accused with reference to their names.

He submitted that this can happen easily due to lapse of time. He would, therefore, submit that the conclusions drawn by the High Court and the Sessions Court, as regards the guilt of the appellants, cannot be faulted with.

REASONS AND CONCLUSIONS

5. We find that the prosecution case depends only on the testimony of PW-3 Krishna and PW-4 Kanwarbai. The age of PW-3 was 12 years at the time of the recording of her evidence. Evidence of PW-3 cannot be rejected only on the ground that her age was 12 years. However, being a child witness, her evidence needs a very careful evaluation with greater circumspection considering the fact that a child witness can always be easily tutored. Therefore, we have made a careful scrutiny of her version. In the examination-in-chief, she stated that she saw that 30-35 persons were assaulting her father (the deceased). She stated that she identified persons, namely, Raghunath (accused no.1); Shyama (accused no.8); Bhavana (Bhawani) – accused no.20; Modu and Chaturbhuj (accused no.15). There are two accused by the name of Modu (accused no.2 and

accused no.14). Though she named Shyama (accused no.8), she described him as Bhavana's (Bhawani's) brother. As can be seen from the names of the accused, Bhavana is the son of Kana Ahir and accused no.9 Radhey Shyam is also a son of Kana Ahir. For identifying the accused who were present in the dock, a very peculiar procedure was followed. The accused, whose names were taken by PW-3, were told to stand outside the dock and others were told to continue in the dock. While the five accused were being brought out of the dock, the witness was told to remain out of the Court Hall. This procedure was unfair to the accused as it was aimed at facilitating easy identification of the five accused by the minor witness. Such a procedure is not fair to the accused. It is noted in the deposition that PW-3 identified accused Radhey Shyam (accused no.9) as a son of Kana by calling him Shyama. She correctly identified accused Bhavana, son of Kana, Modu, son of Nathu and Chaturbhuj as a son of Onkar. She identified accused no.1 Raghunath as Modu as a son of Ramchander. In the cross-examination, when a Court question was put to her, calling upon her to explain why she has identified Modu by saying that

he is Raghunath, the witness replied that she had forgotten due to lapse of time. In response to a question who was Radhey Shyam, she replied that he was a *brahmin* and is not an accused. She accepted that her grandmother had told her that their family had a fight with Ahirs, who have formed the Azad party. She also accepted that her grandmother told her the names of Modu, Bhavan, Chaturbhuj and Raghunath as persons forming the party. She stated that she had told the police while recording her statement that 30-35 persons belonging to the Azad party were assaulting her father. The manner in which the minor witness identified the accused, it becomes unsafe to convict the accused based only on her testimony.

6. Now we turn to the deposition of PW-4 Kanwarbai, who is the mother of the deceased. According to her version, PW-3 Krishna came to her weeping and stated that 30-35 persons were beating her father. When she rushed to the spot, she found her son (Raghunath) crying in pain. She stated that in her presence, Gopal (accused no.17) inflicted a blow on the ear of the deceased. She stated that accused no.20 gave a *lathi* blow on the arm and left armpit of her son. She stated that

accused no.1 Raghunath, accused no.7 Pratap and accused no.5 also gave *lathi* blows to her son. When she was questioned whether she was able to identify 30-35 accused persons with their names, her response was that she knew their names and also their father's names and she was in a position to identify them. Thereafter she stated several names. When she was called upon to identify the accused, she could not identify any one of the accused with reference to their names. The learned Judge noted in the deposition that PW-4 could not identify any accused. The note made by the learned Sessions Judge reads thus :

“Note: - The witness by going close the accused, taking round again and again, by pushing aside in front and by going close the rear person tried to have a look, identified in this manner and sometime by standing for a moment close to the accused went ahead and on return could identify someone, also stated that vision is not clear because there is some darkness. Two tube lights are burning in court whereby sufficient light is there and one tube light is on the side of the accused themselves. **The witness stated that though the light is sufficient and faces are also visible but it is not assessed as to who are these persons.**”

(emphasis added)

Thereafter PW-4 was asked who were the accused out of the persons present. She stated that all of them were there but their faces were not clear for identification.

7. Thus, PW-4, who claims to be an eye witness, could not identify a single accused by name in the Court though she claimed that she was in a position to identify the accused by their names as well as their respective father's name.

8. We have already discussed the evidence of PW-3, the minor witness. Her testimony shows that she got confused while identifying at least two accused though five accused whom she allegedly named were made to stand separately from the remaining accused. The version of PW-3 Krishna, when it comes to the identity of the accused, does not inspire confidence. In any case, it is very unsafe to convict the accused on the basis of such testimony, especially when the only other eye witness (PW-4) believed by the Trial Court could not identify a single accused in the Court. The learned Trial Judge noted that there was sufficient light in

the courtroom and faces of the accused were clearly visible.

9. We are, therefore, of the considered opinion that the identity of the named accused as assailants of the deceased has not been established in the Court beyond a reasonable doubt. Then what remains is the evidence of the alleged recovery of the weapons of assault at the instance of the accused. The conviction cannot be sustained only on the basis of the alleged recovery.

10. Therefore, the conviction of the appellants under impugned judgments and orders is hereby quashed and set aside and the appellants are acquitted of the charge levelled against them. The appellants are on bail. Their bail bonds stand cancelled. The appeal is accordingly allowed.

.....**J.**
[ABHAY S. OKA]

.....**J.**
[RAJESH BINDAL]

New Delhi
April 12, 2023.