

**Neutral Citation No. - 2024:AHC:144150-DB**

**RESERVED**

**A.F.R.**

**Court No. - 45**

**Case :-** CRIMINAL APPEAL No. - 1059 of 1986

**Appellant :-** Gorelal Alias Shyam Narain And Others

**Respondent :-** State of U.P.

**Counsel for Appellant :-** R.C. Singh, Balendra Kumar Singh

**Counsel for Respondent :-** Aga.

**Hon'ble Siddhartha Varma, J.**

**Hon'ble Ram Manohar Narayan Mishra, J.**

1. The present criminal appeal has been filed against the judgement and order dated 24.3.1986 passed by the 3<sup>rd</sup> Additional Sessions Judge, Fatehpur, in Session Trial No. 416 of 1983 convicting and sentencing the appellants under Section 302 read with Section 149 IPC for life imprisonment, under Section 148 IPC for three years rigorous imprisonment and under Section 147 IPC for two years with rigorous imprisonment. All the sentences were directed to run concurrently.

2. When the alleged incident took place on 6.5.1983 at around 8:30am a first information report was got lodged by the son of the deceased Pramod Kumar Gupta at 9:25 am on the very same day. In the first information report, there was a specific averment that Gorelal son of Badku, Sheo Ram son of Bajrang, Shatrughan Singh son of Ganga Singh, Ompal Singh, Rajendra Singh and Narendra Singh with their guns and Shiv Singh who was empty handed had reached the shop where Gopi Krishan was running his shop. Thereafter, Gorelal had fired

upon the deceased- Gopi Krishna Gupta. The firing done by Gorelal was followed by an indiscriminate firing by Sheoram, Shatrughan, Ompal Singh, Rejendra Singh and Narendra Singh.

3. Upon the lodging of the first information report, the police got into action and investigation followed. A panchayatnama was prepared stating that the incident was got reported in the police station at 9:25am on 6.5.1983 and that the panchayatnama proceeding commenced on 6.5.1983 at 10:00am and it also stated that on the very same day at 11:00am the panchayatnama proceeding got concluded. After the panchayatnama was concluded, the dead body of the deceased was sent for post mortem which was conducted on 6.5.1983 at 4:15PM. It may be mentioned that the first informant at the time of getting the F.I.R. lodged had not reported that the deceased Gopi Krishna had died. It had only stated that he was lying in an injured state at his shop. The F.I.R. was also, therefore, followed by an injury report dated 6.5.1983 and was allegedly said to have been prepared at 8:45am. Not only this, from the record it can be found that there was a dying declaration also of the deceased numbered as exhibit – kha 6 which was recorded 8:45am again on the same day i.e. on 6.5.1983 by Dr. S.N. Tripathi. This dying declaration had categorically stated upon a question being asked by the Doctor that who exactly was

responsible for the firing and the injured Gopi Krishna had stated that Gorelal was the person who had fired on him and he had also stated while giving the dying declaration that with Gorelal he had no enmity. The Doctor in the dying declaration itself had mentioned that the S.D.M. of Bindki Court was called but he could not appear and the patient had expired at 9:00am. Dr. S.N. Tripathi was not produced by the prosecution but was produced by the defence as D.W. - 4.

4. A recovery memo of two empty cartridges of 12 bore which were found from the place of incident was also prepared and was exhibited as Exhibit - ka23. The police had also taken the plain soil and the soil with blood and the recovery memo of it was marked as exhibit ka-24. Upon investigation having got completed, the police submitted its report and the Court thereafter took cognizance of the case and framed charges against six persons, namely, Gorelal @ Shyam Narain Singh, Sheoram Singh, Shatrughan Singh, Rajendra Singh, Narendra Singh and Ompal Singh for charges under Sections 148, 302 read with 149 IPC. The charges were framed on 23.6.1984 and they were read over to the accused persons and when they did not plead guilty, the case was put to trial.

5. A separate charge sheet was prepared for the accused Shiv Singh on 23.6.1984 itself and the charges in it were three in

number. Firstly, the charge was with regard to the death of Gopi Krishna Gupta under Section 147 IPC and under Section 302 IPC read with Section 149 IPC and the other set charge was with regard to one more deceased Ram Gopal whose dead body was recovered at a little distance away and was under Section 302 read with Section 149 IPC.

6. The Trial Court after recording all the evidence of the prosecution and after going through the evidence on record, convicted Gorelal, Sheoram Singh, Shatrughan Singh, Rejendra Singh, Narendra Singh, Shiv Singh and Ompal Singh under Sections 302 read with 149 IPC. Vis-a-vis Shiv Singh, the charge under Section 302 read with Section 149 along with Section 147 was also held to have been proved and he was also held guilty. All the seven accused persons were sentenced with rigorous imprisonment under Section 302 read with 149 IPC. With regard to the conviction under Section 148 IPC, the punishment of two years with rigorous imprisonment was awarded. However with regard to murder of Ram Gopal, all the accused persons were acquitted.

7. Aggrieved by the judgement and order of the Additional Sessions Judge, Fatehpur, dated 24.3.1986, the instant appeal has been filed.

8. Sri V.P. Srivastava, Senior Advocate, assisted by Sri Jitendra Singh, Sri Rajiv Nayan Singh and M/sNija Srivatava was heard for the appellants, namely, Sheoram Singh, Shiv Singh and Ompal Singh. The appeal vis-a-vis Gorelal, Shatrughan Singh, Rajendra Singh and Narendra Singh had abated on account of the fact that they had died during the pendency of the appeal and no near relatives of theirs had filed any application for continuing the appeal.

9. Learned counsel for the appellants took the Court through the statements of the witnesses of fact i.e. the first informant Pramod Kumar Gupta who had appeared in the witness box as P.W. - 1 and Somdutt as P.W. - 2. He had also drawn the attention of the Court to the statement of P.W.-3 Dr. S.K. Srivastava who had proved the post mortem report. P.W. - 4, Shiv Mohal Singh, was the head constable of Police Station – Bindki. He had proved the exhibit ka-1 i.e. the chik which was prepared by him. P.W. - 5, Madan Singh, was the investigating officer whose statement was also read out to the Court.

10. Learned counsel for the appellants also had drawn the attention of the Court to the deposition of Dr. S.N. Tripathi who was produced by the defence as D.W.-4.

11. P.W. 1, in his statement has stated that he had known Gorelal, Shatrughan Singh, Shiv Ram Singh, Rajendra Singh,

Narendra Singh, Ompal Singh and Shiv Singh from before and that he was also recognizing them and he had stated that they were all of the same party. He has also stated that the accused had enmity with his father. He has given various reasons on account of which the accused persons were inimical to the father of the first informant. In his examination in chief, the first informant had categorically stated that when the incident had occurred, the first shot which was fired by Gorelal- accused had hit his father and he had fallen down in the shop itself and, thereafter, the other accused, excepting Shiv Singh, had with their firearms aimed at his father and fired. When there was a hue and cry raised by the first informant then Somdutt, Smt. Ram Kumari, Om Prakash Goswami and Balbindra came on the spot. Upon reaching of the various persons from the neighbourhood, the accused persons ran away towards the Nehru Inter College. He has stated that his father was still breathing but he could not speak. Thereupon, he stated that on his dictation, Ram Lakhan Tiwari had transcribed the first information report and he has also proved the first information report which he had given to the police. After the dictation was over, the police had reached the spot and in that Jeep, the first informant had taken the injured father to the Bindki Hospital where the Doctor had examined his injuries. He has further stated that he had given the representation to Mohan Singh

Daroga in the Jeep itself and the Daroga had given the report to another policeman who was along with him. He had, therefore, gone to the police station after leaving his father at the hospital.

12. Upon coming to know that his father had passed away, he once again rushed to the hospital. The panchayatnama was done in the hospital itself. The first informant has stated that later on when he came to know that because of the firing another person by the name of Ram Gopal about 100 yards away had also died.

13. The prosecution had cross-examined the witnesses wherein the first informant had stated that the Daroga had come to the site in question but he had not seen anything from the inside of the shop. In paragraph no. 24 of his cross-examination, he has stated that he had, later on, come to know on the basis of a rumour in public that the father of the first informant had died and this effect he had got recorded his statement. He has categorically stated that his uncle Durga Prasad (who was a witness of the panchayatnama) had not informed the first informant about the dying declaration. He has stated that he had not signed the first information report. So far as the P.W. - 2 is concerned, he has stated in his statement-in-chief that the thrust of the bullets was to the extent that after having hit the deceased Gopi Krishna, the pellets had rebounded and had also hit the Neem Tree. In his cross examination, he had stated that he had

reached the spot because he had gone to Bindki market to buy some clothes. He has also stated in paragraph no. 6 of the cross-examination that he had been informed by his wife that the police had called him and, therefore, he had gone straight to the police station where his statement under Section 161 Cr.P.C. was recorded.

14. In paragraph no. 10 of the cross-examination, he had stated that there were other criminal cases pending against him. Dr. S.K. Srivastava, the P.W.-3, in his examination has proved the post mortem report and he has stated that all the injuries were of the same size i.e. 1/2-1/2 inch and that they were three in number. P.W. - 4 has proven the chik. P.W. -5, the Investigating Officer has stated that on 6.5.1983 at around 8:30am, he had got a telephone call from Durga Prasad Gupta that on the crossing of the bus stand firing had taken place. Thereafter with all the police force he had reached the spot, where they found that Gopi Krishna was lying, injured at his shop and, therefore, he had taken the injured Gopi Krishna on his own jeep. He has stated that in the hospital, the son of the deceased Pramod Kumar Gupta had handed over to him the first information report and, thereafter, he had directed the head moharrir to lodge the first information report. He has stated that he was there along with the injured at the hospital and,



thereafter, the injured had died. He has stated in the examination in chief that it was during this time that he also received information that one more dead body had been found in the neighbourhood and, therefore, he went to the place where the other dead body was lying. He has stated that the dead body was identified as that of one Ram Gopal. D.W. - 4, Dr. S.N. Tripathi, the Deputy Chief Medical Officer, has stated on oath that on 6.5.1983, he was the Medical Officer at Bindki and that the deceased Gopi Krishna had been brought to him in an injured state by the police and he had at 8:45am after he had come to the hospital died at 9:00am. The Doctor, D.W.- 4, had stated that he had made all efforts to get the Magistrate before recording the dying declaration of Gopi Krishna but the Magistrate came after the statement was recorded and after the deceased had passed away. He has proved the exhibit kha-6.

15. Learned counsel for the appellants has while challenging the judgement and order dated 24.3.1986 passed by the Additional Sessions Judge made the following submissions:

(i) Learned counsel for the appellants has submitted that the dying declaration is such a declaration which cannot be lightly done away with. Relying upon the famous maxim *Nemo Moriturus Praesmitur Mentiri* submitted that the prosecution, conscious of the fact that the

deceased had only mentioned that Gorelal was present at the spot and had fired upon the deceased and that the injured had not mentioned that there was any enmity between Gorelal and any of the accused, had not relied upon that document i.e. the dying declaration which was brought in by the defence as Exhibit Kha-6. Learned counsel for the appellants states that the prosecution had not made any effort to prove the dying declaration. This, learned counsel for the appellants states, was done because only Gorelal was the person who was responsible for the death of the deceased while the other co-accused persons namely Shiv Ram Singh, Shatrughan Singh, Rajendra Singh, Narendra Singh, Ompal Singh and Shiv Singh were not even present at the spot. Learned counsel for the appellants relying upon the statement of PW-1 has stated that these persons were known to the PW-1, Pramod Kumar Gupta, and they were also known of having enmity with Pramod Kumar Gupta and Gopi Krishna Gupta and, therefore, the first informant PW-1 had falsely implicated all of them. Learned counsel for the appellants, therefore, states that it was an absolute case of false implication of all the other co-accused persons other than Gorelal. Learned counsel for the appellants has further submitted that in the first information report the

first informant, Pramod Kumar Gupta, had stated that Gorelal had fired upon the deceased and thereafter the other co-accused persons had also fired upon him and that after he was injured, he was lying at the shop where the incident had occurred. This first information report, learned counsel for the appellants states, was got lodged on 06.05.1983 at 09:25 AM whereas the PW-1 in his statement before the Court has submitted that in fact when the incident had occurred, the Police had reached the spot and thereafter the injured was put into the jeep of the Police and they had taken the injured to the Bindki Hospital. He has stated that he had also accompanied his father to the hospital. He has thereafter stated that the first information report was got transcribed by Ram Lakhan Tiwari at the place of incident and the first informant had handed over the first information report to Madan Singh, Daroga, who was also sitting in the jeep, and thereafter the first informant alongwith Madan Singh, Daroga had gone to the Police Station to get the first information report lodged. Learned counsel for the appellants, therefore, states that the first informant was in fact not there at the spot at all and after he had got the information about the fact that Gorelal was made an accused by the deceased in his dying declaration and was held

responsible of having had shot on him, he had come up with the whole story. Learned counsel for the appellants states that the other accused persons were also implicated in the case as their names were known to the first informant and they were inimical to him and also his father.

(ii) Learned counsel for the appellants thereafter states that if the injury report and the postmortem reports are seen, it would become evident that all the injuries with firearm injuries which were three in number were  $\frac{1}{2}$  x  $\frac{1}{2}$  inches and he, therefore, states that all the injuries were by one firearm and the other co-accused persons had not at all fired upon the injured/deceased.

(iii) Learned counsel for the appellants thereafter states that there were contradictions in the statements of PW-1 with what he had stated in the first information. He has stated that in the first information report there was a statement of the first informant that the father of the first informant was lying in an injured state in the shop when the incident had occurred whereas in the statement-in-chief he had stated that after the incident had occurred a Police jeep had come and the first informant alongwith the Police had headed towards the hospital and while

going to the hospital the first information report was handed over to Madan Singh, Daroga. Definitely, therefore, he states that the story which had been reported in the first information report and was got lodged as a definite first information, was a concocted story. Learned counsel for the appellants further states that if the statement of PW-1 is compared with the statement of PW-5 then it becomes evident that the case as was being put forth by the prosecution was not a reliable one. Learned counsel for the appellant states that the PW-5 had stated that the son of the deceased, the first informant, in the hospital got transcribed the first information report which was Exhibit Ka-1 and he had directed the Head Muharrir to get the first information report lodged. Learned counsel for the appellants, therefore, states that there is contradiction between the statements of the PW-5 and the PW-1. Still further learned counsel for the appellants states that when there was a definite recording of statement done by D.W.-4 and he had also proved the dying declaration then it did not lie in the mouth of PW-5 to say that he had taken the injured/deceased to the hospital, where he was throughout with the injured and after the injured had died he had left the spot to

investigate into the other death which had taken place i.e. the death of Ram Gopal.

(iv) Still further learned counsel for the appellants states that PW-2, Somdutta, whose name was not mentioned in the first information report allegedly was not there at the spot as had been stated by the PW-1 in his statement-in-chief. In fact the statement of PW-2 is absolutely unreliable inasmuch as he himself states that in fact his wife had told him to go to the Police Station where he had given his statement. Learned counsel for the appellants, therefore, states that he was only a chance witness who was brought in by the prosecution to make the case of the prosecution stronger.

(v) Learned counsel for the appellants states that in the first information even though the PW-1 had not stated anything about any eye-witnesses but in the statement before the Court he had stated that apart from Somdutta, Smt. Ram Kumari, Om Prakash Goswami and Balvindra Singh were also there. He, however, states that none of the persons mentioned in the statement of PW-1 apart from Somdutta (whose evidence is absolutely not believable) were not produced before the Court.

(vi) Learned counsel for the appellants, therefore, states that if the case as a whole is looked into, it becomes evident that there was a dying declaration which was proved by the doctor who had recorded the same and in the dying declaration there was only one name mentioned i.e. of Gorelal and the injured who was getting his dying declaration recorded, had categorically stated that he had no enmity with Gorelal. Learned counsel for the appellants, therefore, states that the other co-accused persons who had been named by the first informant in the first information report were not there on the spot and only to implicate certain persons, who were inimical to the first informant and the deceased, their names were mentioned in the first information report. Learned counsel for the appellants, therefore, states that absolutely there was no ingredient of section 149 of I.P.C. present. The co-accused persons could not be said to have had any common object as is defined under Section 141 of I.P.C., to be with Gorelal. Learned counsel for the appellants relying upon the judgment of Supreme Court in **Vinubhai Ranchhodbhai Patel vs. Rajivbhai Dudabhai Patel & Others** reported AIR 2018 SC 2472 states that when a conviction is to be done under Section 149 of I.P.C. the identification of common object is essential and

when the common object is not identified, the accused cannot be, in any manner, be convicted under the substantive offence with the assistance of Section 149 of I.P.C. To bolster his case, learned counsel relied upon paragraphs 30, 31 and 32 of the judgement which are being reproduced here as under:

*30. The common object of assembly is normally to be gathered from the circumstances of each case such as the time and place of the gathering of the assembly, the conduct of the gathering as distinguished from the conduct of the individual members are indicative of the common object of the gathering. Assessing the common object of an assembly only on the basis of the overt acts committed by such individual members of the assembly, in our opinion is impermissible. For example, if more than five people gather together and attack another person with deadly weapons eventually resulting in the death of the victim, it is wrong to conclude that one or some of the members of such assembly did not share the common object with those who had inflicted the fatal injuries (as proved by medical evidence); merely on the ground that the injuries inflicted by such members are relatively less serious and non fatal.*

*31. For mulcting liability on the members of an unlawful assembly under Section 149, it is not necessary that every member of the unlawful assembly should commit the offence in prosecution of the common object of the assembly. Mere knowledge of the likelihood of commission of such an offence by the members of the assembly is sufficient. For example, if five or more members carrying AK 47 rifles collectively attack a victim and cause his death by gunshot injuries, the fact that one or two of the members of the assembly did*



*not in fact fire their weapons does not mean that they did not have the knowledge of the fact that the offence of murder is likely to be committed.*

*32. The identification of the common object essentially requires an assessment of the state of mind of the members of the unlawful assembly. Proof of such mental condition is normally established by inferential logic. If a large number of people gather at a public place at the dead of night armed with deadly weapons like axes and fire arms and attack another person or group of persons, any member of the attacking group would have to be a moron in intelligence if he did not know murder would be a likely consequence.*

16. Sri Amit Sinha, learned A.G.A. assisted by Ms. Mayuri Mehrotra, however, supported the judgment. Learned AGA submitted that eye-witness account could not be brushed aside lightly. He further submitted that when even if dying declaration had mentioned just one name it mattered little as there were definite evidence of the fact that the other accused persons were involved in the crime. Learned AGA still further submitted that if there were some minor contradictions in the statement of the prosecution witnesses then also they ought to be ignored, looking to the other evidence which was led in the case.

17. Having heard the learned counsel for the appellants Sri V.P. Srivastava, Senior Advocate, assisted by Sri Jitendra Singh, Sri Rajiv Nayan Singh and M/s Nija Srivastava and the learned AGA Sri Amit Sinha assisted by Ms. Mayuri Mehrotra counsel for the State, this Court is of the view that definitely the

prosecution case becomes weak when one looks into the dying declaration. In the dying declaration, the deceased had mentioned that Gorelal alone was present at the place and he had fired upon the injured deceased. However, even in the dying declaration, the injured deceased had mentioned that there was no enmity between Gorelal and the injured/deceased. We find that the prosecution realizing fully well that its case would become weak had not tried to prove the dying declaration. It was also not exhibited in the trial and in fact the defence brought it as exhibit kha-6. We are also convinced that the names of the other co-accused which never found place in the dying declaration were mentioned by the P.W.-1, the first informant only to settle scores with them. It appears that the P.W. -1 was inimical to the other co-accused persons and, therefore, while he was lodging the first information report with regard to the murder of his father, he had mentioned those names as well. Also, we are of the view that P.W. - 1 Pramod Kumar Gupta was not sure as to how the incident had occurred and he gives stories which are at variance with each other. This convinced the Court that the petitioner no. 1 was, in fact, not at the spot. Also, from the post-mortem report, we find that firearm injuries were only of one size and if the other co-accused also fired then there would have been injuries of different sizes and, therefore, this also falsifies the case of the

prosecution. Needless to mention that the contradictions were such that the statements of the various prosecution witnesses become highly unreliable. Also, we find that Somdutt, the P.W. - 2, was not at the spot as he, in fact, has mentioned in his statement that he had gone to the police station when his wife had sent him and the P.W. - 1 in his statement in chief had definitely stated that P.W. - 2 was not there at the spot. Also, we find that P.W. - 1 had tried to improve the case which he had taken in the first information report at the time of getting his statement recorded in the Court. He had stated that Smt. Ram Kumari, Om Prakash Goswami and Balbindra were also there on the spot. The Court finds that they were never produced as prosecution witnesses in the Court. Also, we find that when the other co-accused were not there at the spot and when there was no meeting of mind with regard to any common object then the various co-accused persons could not be implicated under Section 149 IPC.

18. Under such circumstances, the instant criminal appeal is allowed and the judgement and order dated 24.3.1986 passed by the 3<sup>rd</sup> Additional Sessions Judge, Fatehpur, in Session Trial No. 416 of 1983 is quashed and set aside vis-a-vis appellant no. 2 Sheoram Singh, appellant no.6 Shiv Singh and the appellant no. 7 Ompal Singh. The appellants No. 2, 6 and 7 are acquitted of

the charges on the basis of which the trial had proceeded. Since the appellants no. 2, 6 and 7 are on bail, the bail bonds and sureties are discharged. With regard to the appellants no. 1, 3, 4 and 5, the appeal had already abated.

**Order Date :- 4.9.2024**

PK

(R.M.N. Mishra,J.)

(Siddhartha Varma,J.)