

State Of U.P vs Naresh And Ors on 8 March, 2011

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Bench: B.S. Chauhan, P. Sathasivam

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.674 of 2006

State of U.P.

...Appellant

Versus

Naresh & Ors.

...Respondents

J U D G M E N T

Dr. B.S. CHAUHAN, J.

1. This appeal has been preferred against the judgment and order dated 19.5.2004 passed by the High Court of Judicature at Allahabad in Criminal Appeal No.2866/1980, acquitting the

respondents by reversing the judgment and order dated 9.12.1980, passed by the Sessions Judge in Sessions Trial Nos.181 and 182 of 1980, convicting the said respondents under sections 302/34, 307/34 and 379/34 of the Indian Penal Code, 1860 (hereinafter called the `IPC') and sentencing them under the first count to life imprisonment, under the second count to rigorous imprisonment for 5 years and under the third count to rigorous imprisonment for 2 years. However, all the sentences were directed to run concurrently.

2. Facts and circumstances giving rise to this appeal are that on 16.10.1979, in the morning Naresh, respondent no.1 herein, started digging the (Chak Road) to create a passage from the field of the informant Subedar (PW.1). He was stopped by Balak Ram (PW.5).

Naresh, respondent no.1, not only abused Balak Ram (PW.5), but also assaulted him and threatened him that he would face dire consequences. With regard to this, Balak Ram (PW.5) lodged the complaint of the incident at about 9.30 a.m. in Police Station, Kampil, District Farukhabad. Balak Ram (PW.5) was accompanied to the police station by the informant Subedar (PW.1) and their uncle Sri Ram (deceased). Balak Ram (PW.5) and Sri Ram (deceased) had a rifle and a gun with them.

3. After lodging the complaint in the police station, Kampil, one of them, went to the market to make some purchases and, subsequently, they returned to their village in the evening. While coming back to their village Karanpur, from Kampil, at about 5 p.m. on Kampil - Aliganj Road, as soon as they approached the fields of Gajraj and Ganga Ram; they found the four accused (respondents herein) emerging out from the bushes armed with gun and country made pistols. They hurled abuse at them and also opened fire. Sri Ram and Balak Ram (PW.5) received gun shot injuries. Sri Ram died on the spot, however, Subedar (PW.1) escaped unhurt. After hearing a distress cry, some persons working in the nearby fields rushed towards the place of occurrence. The accused ran away from the place of occurrence snatching the gun, rifle and ammunitions from the victims.

4. After the arrival of the family members of the victims and some villagers at the place of occurrence, Subedar (PW.1) went to the police station in Kampil, at a distance of 6 miles from the place of occurrence, and lodged the First Information Report (hereinafter called the "FIR") at 9.30 p.m. naming all the accused. Injured Balak Ram (PW.5) was sent for a medical examination at Public Health Centre, Kayamganj which was at a distance of 20 k.m from the place of occurrence. He was examined on the same day by Dr. R.C. Gupta (PW.3) at 10.30 p.m. The Investigating Officer reached the place of occurrence at 10.15 p.m. on the same night, however, the inquest could not be prepared at night due to inadequate light.

5. Ultimately, inquest proceedings could be started at 6.30 a.m. on 17.10.1979. The body of Sri Ram (deceased) was sealed and handed over to Sughar Singh, Constable (PW.9) for taking to the mortuary for post-mortem at Fatehgarh. The I.O. prepared the site plan and started investigation. As none of the accused could be traced, proceedings under Sections 82-83 of the Code of Criminal Procedure, 1973 (hereinafter called "Cr.P.C.") were initiated on 21.10.1979. For that purpose, the Magistrate issued notices on 25.10.1979. In view thereof, two accused, namely, Naresh and Shyam Singh surrendered on 25.10.1979 in the court of the Judicial Magistrate. The remaining two accused, namely, Bharat and Jagpal surrendered on 29.10.1979.

6. After completing the investigation, a chargesheet was filed against all the four accused. They denied their involvement in the crime and claimed trial. In order to establish its case before the trial Court, the prosecution examined 11 witnesses including Subedar (PW.1), informant and Balak Ram (PW.5), injured. After concluding the trial, the trial Court convicted and sentenced all the four accused as mentioned hereinabove.

7. Being aggrieved, all the four convicts preferred Criminal Appeal No.2866/1980, before the High Court which has been allowed vide judgment and order dated 19.5.2004 (impugned) and all the four convicts stood acquitted. Hence, this appeal.

8. During the pendency of this appeal before this Court, Bharat, one of the accused died and his name stood deleted from the array of parties vide order of this Court dated 5.5.2006. Thus, we have to deal with three accused, namely, Naresh, Jagpal and Shyam Singh.

9. Shri R.K. Gupta, learned counsel appearing for the appellant-

State has submitted that the High Court has erred in reversing the well reasoned judgment of the trial court giving unwarranted attention to minor contradictions on trivial matters and taking into consideration non-existent facts. The High Court has held that the FIR was ante-

timed and ante-dated without giving any reason whatsoever. The High Court held that the FIR was subject to doubt, though such a finding does not get any support from any material on record. The FIR has been lodged most promptly considering the distance between the place of occurrence and the police station. Balak Ram (PW.5) -

injured witness had been examined by Dr. R.C. Gupta (PW.3) within a few hours of the incident. Therefore, the finding that the FIR was ante-timed and ante-dated is erroneous and contrary to the documents on record. The High Court without giving any cogent reason held that testimony of Balak Ram (PW.5) who suffered gun shot injuries, was not worth believing. Such a view is contrary to the consistent and persistent view taken by this Court time and again that the presence of injured witness cannot be doubted and his version of events can, even in exceptional circumstances, be relied upon with care and caution.

The High Court reversed the trial court's judgment also on the ground that not a single independent witness has been examined by the prosecution. Such a finding has been recorded without considering the fact that incident occurred in the evening at a considerable distance from the village on the road and some persons had arrived after hearing the hue and cry by Balak Ram (PW.5) and Subedar (PW.1). By that time, the accused had run away, snatching the arms of the victims. In view thereof, the appeal deserves to be allowed and the judgment and order of the High Court is liable to be set aside.

10. On the contrary, Shri Manoj Prasad, learned counsel appearing for the respondents, has vehemently opposed the appeal contending that the incident occurred three decades ago. The respondents have been acquitted by the High Court after considering all the material on record. In

respect of the incident that occurred on the morning of 16.10.1979, Balak Ram (PW.5) lodged the complaint on the basis of which NCR was recorded, wherein only Naresh, accused had been named. The not naming of the other accused is a good ground for rejecting the prosecution case in its entirety. The finding of fact recorded by the High Court cannot be said to be perverse warranting interference by this Court. No recovery of arms and ammunitions had been made from the respondents/accused. The rifle and gun which were allegedly snatched from the victims had been recovered after a long time from the dacoits killed in an encounter in District Etah. The High Court has rightly disbelieved Balak Ram (PW.5) on the basis of material contradictions in his deposition. This Court has laid down definite parameters for interference with the order of acquittal and this case does not fall within those parameters. Thus, there is no cogent reason for this Court to interfere with the same.

Prosecution suppressed the true genesis of the incident and enroped the respondents due to pre-existing enmity. The prosecution failed to prove its case beyond reasonable doubt. Thus, no interference is warranted, the appeal lacks merit and is liable to be dismissed.

11. We have considered the rival submissions made by learned counsel for the parties and perused the record.

12. The admitted facts of the case remained that the incident occurred on the morning of 16.10.1979 in respect of which the NCR was recorded by the police station in Kampil, naming Naresh as one of the accused. The FIR, in respect of the incident that occurred on the same day in the evening, was lodged within 3-1/2 hours of the time of incident at police station, Kampil at a distance of about 6 miles from the place of occurrence; the I.O. reached the place of occurrence at 10.15 p.m. Balak Ram (PW.5) injured, had been examined in the Public Health Centre, Kayamganj at 10.30 p.m. on the same day by Dr. R.C. Gupta (PW.3) at a distance of 20 k.m. from the place of occurrence.

13. Dr. R.C. Gupta (PW.3) found the following injuries on the person of Balak Ram (PW.5):

(i) Two abrasions in a area of 1 cm x < cm over outer side of right forearm, lower part. Scab not formed.

(ii) Gun shot wound of entry 4 cm x 2 cm x through and through over inner aspect of right thigh middle part. Margins are irregular and inverted. Blackening and tattooing around the wound absent.

Direction is down and lateral. Oozing of fresh blood from the wound present. Advised X-ray.

(iii) Guns shot wound of exit 17 cm x 8 cm x through and through over outer side of right thigh 5 cm above the right knee joint. Margins are irregular and everted. Blackening and tattooing absent. Oozing of fresh blood present. Advised X-ray.

Injury No.1 is caused by friction. Injury Nos.2 and 3 are caused by projectile firearm. Injury No.1 is simple in nature. Injury nos.2 and 3 are kept under observation. Advised X-ray right thigh.

Duration fresh.

Dr. Anil Kumar Dubey (PW.2) conducted the post-mortem examination on the body of Sri Ram (deceased) and found the following ante-mortem external injury on his corpse:-

(i) Circular gun shot wound of entry 1" in diameter and chest cavity deep situated on the right side of the back of the chest, 3" below the lower angle of the right scapula and 3" away from the mid line in the direction of 3 O' clock. The margins of the wound were inverted and charred.

On internal examination of the corpse of Sri Ram, Dr. Dubey found 6th, 7th and 8th ribs broken under the external injury said above.

Beneath, he found the pleura and the right lung lacerated. All the four chambers of the heart were empty. He found 2 lbs of free blood in thoracic cavity. The upper lobe of the liver was lacerated. Right side of the diaphragm also was lacerated. The stomach was empty. The intestines had faecal matter and gas. In the thorax Dr. Dubey had found a piece of wadding and 20 small shots respectively Exc.1 and 2.

14. The trial Court after considering the evidence on record came to the conclusion that the FIR had been lodged most promptly at about 9.30 p.m. on the same date naming all the four accused. The High Court doubted the FIR and labeled the same to be ante-timed or ante-

dated. Deposition of Constable Sughar Singh (PW.9) before the court revealed that the dead body had been handed over to him for the purpose of post-mortem on 17.10.1979 at 8 a.m. after having panchnama and sealing thereof, he reached Fatehgarh Police line along with Constable Ram Chand in a Tonga and got the entry made in the Rojnamcha. Post-mortem was conducted on 18-10-1979 at about noon on his identification of the dead body. The dead body remained in sealed condition throughout and nobody had any occasion to touch it. Record further reveals that Constable Sughar Singh (PW.9) was not cross-examined by any of the respondents accused nor any such question had been put to Dr. A.K. Dubey (PW.2) who had conducted the post-mortem in this regard. According to Dr. Dubey, Sri Ram could have died on 16.10.1979 at about 5-7 p.m. He has not been cross-examined as to under what circumstances the post-

mortem could not have been conducted at an earlier point of time.

15. The High Court has believed the theory put forward by the defence that the guns looted from the victims had been recovered from the dacoits who were killed in an encounter on 14-15 November, 1979 in Etah District. Therefore, there had been some manipulation in the prosecution's case. None of the respondents accused had taken this defence in their statement under 313 Cr.P.C. Naresh, respondent no.1 had stated that he was not aware of the same. When a specific question was put to him he replied that he had also heard that in an encounter 6 dacoits had been killed in District Etah and some arms and ammunitions had been recovered from them. He had not stated anywhere that the said arms and ammunitions had been looted by those dacoits or had been recovered from them.

This suggestion was also put to Balak Ram (PW.5) when examined on 30.8.1980 and he has stated that he had not been aware that their rifle and gun had been recovered from the dacoits killed in an encounter in District Etah. In fact, Inspector Charanpal Singh (PW.11) had deposed first time on 11.11.1980 that 6 dacoits had been killed in an encounter in District Etah and some arms and ammunitions were recovered from them and out of the said recovered arms, namely, rifle - Ex.7, gun - Ex.8 and some ammunitions - Ex.9 were produced in the court.

16. The High Court has doubted the case of the prosecution for non-recovery of the arms from the respondents accused. The High Court failed to appreciate that as the incident occurred on 16.10.1979 and none of these accused were traceable, the Investigating Officer filed an application for initiating proceedings under Sections 82-83 Cr.P.C. on 21.10.1979. Proceedings of attachment of immovable property were drawn on 25.10.1979. In consequence thereof, two accused surrendered in the court on 25.10.1979 and the remaining two surrendered on 29.10.1979. Meanwhile, S.I. Brijendra Singh (PW.7), the I.O. stood transferred to another police station and the investigation could not be carried out smoothly. Thus, such a ground would not be sufficient to discredit the prosecution case.

17. The High Court has given undue weightage to the suggestion made by defence that Surjan Singh, Inspector of U.P. Police, brother of Balak Ram (PW.5) had been an instrument to the manipulation of the record, though such a suggestion was denied by S.I. Brijendra Singh (PW.7), the I.O., stating that Surjan Singh did not meet him on 17.10.1979, but he had met him at a later stage but he could not give the exact date of meeting. The High Court had unnecessarily doubted his statement without realising that his statement had been recorded in the court on 30.8.1980 after about 11 months. The High Court has given undue importance to the minor contradictions in the statement of Subedar (PW.1) and Balak Ram (PW.5) as one of them had stated that the I.O. reached the place of occurrence at 10.15 p.m. and another has stated that he reached about mid night. The incident occurred in mid October 1979. This is the time when the winter starts and in such a fact-situation no person is supposed to keep record of exact time particularly in a rural area. Everybody deposes according to his estimate. More so, the statement had been recorded after a long lapse of time. Therefore, a margin of 1-1/2 hours remained merely a trivial issue. The High Court had taken a very serious note of the statement of Balak Ram (PW.5) in respect of the first incident wherein he had stated that Naresh, the accused, had initially abused him and then beaten him with danda but in the FIR he had stated that accused Naresh had given blow with butt-end of the spade. There was minor contradiction in the statements of Subedar (PW.1) and Balak Ram (PW.5) in respect of the first incident of the same date and minor variations in their statements which persuaded the High Court to disbelieve the presence of Subedar (PW.1) in the morning incident.

18. The trial Court had taken note of the first incident that occurred in the morning and considered the same in correct prospective, that in the morning incident Balak Ram (PW.5) got an injury on his arm as has been found by Dr. R.C. Gupta (PW.3) and not on the head. The statement made by Balak Ram (PW.5) may not be correct in this regard for the reason that he could not remember that he got the injury on his arm and not on the head. This version is duly supported by the NCR shown by (Ex. Ka.6). Had there been any concoction in the said NCR (Ex. Ka.6), either with the police personnel at Kampil Police Station or at the behest of Inspector Surjan Singh, brother of Balak Ram (PW.5), then

there could not have been any discrepancy in the contents thereof. So far as this minor contradiction was concerned, Constable Shiv Nath Singh (PW.6) was not at all cross-examined in this respect. No suggestion was put to Constable Shiv Nath Singh (PW.6), who was examined much later than Subedar (PW.1) in this regard. In respect of the first incident S.I. Brijendra Singh (PW.7), the I.O., has stated that he had seen the pits made by Naresh, accused on the western side of the Chak Road in front of his house. It had not been a suggestion of any person that the pits had been made by any person from the complainant party. Presence of the pits was an important circumstance supporting the prosecution version so far as the morning incident was concerned and the High Court erred gravely not taking note of this specific finding by the trial Court.

19. The High Court had doubted the prosecution case that if in respect of the first incident NCR had been lodged in the morning, why had the complainant party stayed at Kampil for the whole day? The trial Court had recorded a finding after scrutiny of the evidence that 12 rowdy persons had been taken into custody and that the police officers of that police station remained pre-occupied with that particular dispute and so not a single constable was available to come with the complainants.

20. The High Court also fell in error that whilst reaching from the place of occurrence to the police station, the complainant party covered the distance in one hour but while coming back in the evening they had taken a longer time. The time gap was not so much that it could give rise to any kind of suspicion. Such a trivial issue could not have been a ground for acquitting the accused. More so, no question in this regard was put to either of the star witnesses, when they were cross-examined.

21. The High Court has further found a material contradiction in the statements of Subedar (PW.1) and Balak Ram (PW.5) and had made this one of the grounds for the acquittal of the accused observing:

"To meet the situation Balak Ram claims that he fell unconscious little after receipt of his injury, whereas Subedar Singh stated that he immediately fell unconscious. Therefore, it is not possible for him to see and notice his assailants. For the said contradictions the testimony of this witness cannot be given adequate weightage."

In the facts of this case, time gap could be only of few minutes, thus, it was not even worth taking note of by the High Court.

22. The High Court has doubted the prosecution version also on the ground that Subedar (PW.1) did not suffer any injury in the said incident without appreciating his deposition that all of them were walking at some distance and he was about 7-8 steps behind Sri Ram (deceased) and Balak Ram (PW.5) and immediately after seeing the accused persons, he ran backward. After taking 15-20 steps, he saw that persons working in the surrounding fields had started coming and then he stopped, and saw the accused taking away the arms and ammunitions from Sri Ram (deceased) and Balak Ram (PW.5).

23. The High Court has disbelieved Balak Ram (PW.5), who had suffered the gun shot injuries. His evidence could not have been brushed aside by the High Court without assigning cogent reasons.

Mere contradictions on trivial matters could not render his deposition untrustworthy.

The evidence of an injured witness must be given due weightage being a stamped witness, thus, his presence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present during the occurrence. Thus, the testimony of an injured witness is accorded a special status in law. The witness would not like or want to let his actual assailant go unpunished merely to implicate a third person falsely for the commission of the offence.

Thus, the evidence of the injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein. [Vide: Jarnail Singh v. State of Punjab, (2009) 9 SCC 719; Balraje @ Trimbak v. State of Maharashtra, (2010) 6 SCC 673; and Abdul Sayed v. State of Madhya Pradesh, (2010) 10 SCC 259].

24. The High Court disbelieved both the witnesses Subedar (PW.1) and Balak Ram (PW.5) as being closely related to the deceased and for not examining any independent witnesses. In a case like this, it may be difficult for the prosecution to procure an independent witness, wherein the accused had killed one person at the spot and seriously injured the other. The independent witness may not muster the courage to come forward and depose against such accused. A mere relationship cannot be a factor to affect credibility of a witness.

Evidence of a witness cannot be discarded solely on the ground of his relationship with the victim of the offence. The plea relating to relatives' evidence remains without any substance in case the evidence has credence and it can be relied upon. In such a case the defence has to lay foundation if plea of false implication is made and the Court has to analyse the evidence of related witnesses carefully to find out whether it is cogent and credible. [Vide Jarnail Singh (supra), Vishnu & Ors. v. State of Rajasthan, (2009) 10 SCC 477;

and Balraje @ Trimbak (supra)].

25. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety.

The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

"Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility." Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. [Vide: State Represented by Inspector of Police v. Saravanan & Anr., AIR 2009 SC 152; Arumugam v.

State, AIR 2009 SC 331; Mahendra Pratap Singh v. State of Uttar Pradesh, (2009) 11 SCC 334; and Dr. Sunil Kumar Sambhudayal Gupta & Ors. v. State of Maharashtra, JT 2010 (12) SC 287].

26. The High Court has also fallen into error in giving significance to a trivial issue, namely, that in respect of the morning incident all the accused had not been named in the complaint/NCR.

It is settled legal proposition that FIR is not an encyclopedia of the entire case. It may not and need not contain all the details. Naming of the accused therein may be important but not naming of the accused in FIR may not be a ground to doubt the contents thereof in case the statement of the witness is found to be trustworthy. The court has to determine after examining the entire factual scenario whether a person has participated in the crime or has falsely been implicated.

The informant fully acquainted with the facts may lack necessary skill or ability to reproduce details of the entire incident without anything missing from this. Some people may miss even the most important details in narration. Therefore, in case the informant fails to name a particular accused in the FIR, this ground alone cannot tilt the balance of the case in favour of the accused. [Vide: Rohtash v. State of Rajasthan, (2006) 12 SCC 64; and Ranjit Singh & Ors. v. State of Madhya Pradesh, JT 2010 12 SC 167].

27. We are fully aware of the fact that we are entertaining the appeal against the order of acquittal. Thus, the Court has to scrutinize the facts of the case cautiously and knowing the parameters fixed by this Court in this regard.

Every accused is presumed to be innocent unless his guilt is proved. The presumption of innocence is a human right subject to the statutory exceptions. The said principle forms the basis of criminal jurisprudence in India. The law in this regard is well settled that while dealing with a judgment of acquittal, an appellate court must consider the entire evidence on record so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable.

An appellate court must also consider whether the court below has placed the burden of proof incorrectly or failed to take into consideration any admissible evidence or had taken into consideration evidence brought on record contrary to law? In exceptional cases, whether there are compelling circumstances and the judgment in appeal is found to be perverse, the appellate court can interfere with the order of acquittal. So, in order to warrant interference by the appellate court, a finding of fact recorded by the court below must be outweighed evidence or such finding if outrageously defies logic as to suffer from the vice of irrationality. [Vide: Babu v. State of Kerala, (2010) 9 SCC 189; and Dr. Sunil Kumar Sambudayal Gupta & Ors. (supra)].

28. The instant case is required to be examined in the totality of the circumstances and in the light of the aforesaid legal propositions. The Court has to strike a balance in the interest of all the parties concerned. Thus, there is an obligation on the court neither to give a long latitude to the prosecution, nor construe the law in favour of the accused. In view of the aforesaid analysis of facts and evidence on record, we reach the inescapable conclusion that the High Court has gravely erred in discarding the evidence of Subedar (PW.1) and Balak Ram (P.W.5) as a result of merely being relatives of the deceased, Sri Ram. The High Court further fell into error in not giving due weightage to the deposition of Balak Ram (P.W.5), a stamped witness, who had suffered gun shot injuries. The High Court made too much of insignificant discrepancies, which were made the basis for acquittal.

Thus, we are of the considered opinion that the findings recorded by the High Court are perverse and cannot be sustained in the eyes of law.

29. Thus, the appeal is, accordingly, allowed. Judgment and order dated 19.5.2004 passed by the High Court is hereby set aside and the judgment and order of the trial court dated 9.12.1980 passed in Sessions Trial No. 181 and 182 of 1980 convicting the respondents under Sections 302/34, 307/34 and 379/37 of IPC and the sentences so imposed, is restored. As the respondents have been acquitted by the High Court, the copy of the order be sent to the Chief Judicial Magistrate, Farukhabad, to take the respondents into custody and send them to jail to serve the unserved part of the sentence.

.....J. (P. SATHASIVAM)J. (Dr. B.S. CHAUHAN) New Delhi, March 8,
2011