

MATTAR
v.
STATE OF U.P.

JULY 23, 2002

[Y.K. SABHARWAL AND H.K. SEMA, JJ.]

Code of Criminal Procedure, 1973:

s.392—Opinion of third Judge—Conviction u/s. 302/34 IPC by Court of Session—Appeal before Division Bench of High Court—Judges divided in opinion—Matter placed before third Judge—Opinion of third Judge containing a brief reference made to the testimony of only one of the eye witnesses—Held, except a brief reference to the testimony of PW 2, opinion of third Judge does not show that the Judge independently considered the testimony of other eye-witnesses, in particular PW 1 and PW 3—The Judges in different dissenting opinions have given detailed reasons for and against the acceptance of version as deposed by these eye witnesses —The third Judge under these circumstances was required to independently examine the matter and express his opinion—It is not permissible to only or merely indicate the agreement with one or other view without giving reasons therefor—Matter remanded to High Court to be heard afresh by a third Judge so as to make available to parties a reasoned opinion showing that relevant evidence and submissions that may be urged on behalf of parties have been independently considered—Judgment—Difference of opinion—Opinion of third Judge.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 334 of 1999.

From the Judgment and Order dated 6.4.18/13.10.98 & 16.10.98 of the Allahabad High Court in Crl. Appeal No. 2091 of 1980.

B.B. Singh, Kumar Rajesh Singh and Ms. Sunita Rani Singh for the Appellant.

Ms. Vibha Datta Makhija and A.S Pundir for the Respondent.

The following Order of the Court was delivered :

A The appellant and his brother were charged for double murder - one of Ashok Kumar and other of Ram Prasad, Appellant was convicted under Section 302 IPC and his brother for offence under Section 302/34 IPC by Court of Sessions. They were awarded life sentence.

B During the pendency of appeal in the High Court against conviction and sentence passed by the Court of Sessions, brother of the appellant died. The appellants' appeal was heard by a Division Bench of the High Court. There was difference of opinion between the two learned judges, one expressed the opinion that the appeal of the appellant deserves to be allowed and the other learned judge was of the opinion that the appeal deserves to be dismissed.

C Both the learned Judges gave separate judgments which are fairly lengthy and contain a detailed examination of evidence. In view of this difference of opinion the matter was placed before a third learned Judge.

D The case of the prosecution is based on the ocular testimony of three witnesses PWs 1, 2 and 3, besides the testimony of the informant PW4 and other evidence including medical evidence produced in the trial before the Court Sessions. The third learned Judge, before whom the matter was placed, expressed the opinion that the appellant was rightly convicted under Section 302 IPC and awarded sentence of life imprisonment. In that opinion a brief reference has been made to the testimony of only one of the eye-witnesses, namely PW2 Smt. Kallania. According to the prosecution she was eye-witness to the murder of Ram Prasad and not to the murder of the other deceased-Ashok Kumar. The eye-witnesses to the murder of Ashok Kumar, according to the prosecution case, were PW1 and PW3. PW3 is an employee of PW1. Ashok Kumar deceased was brother of PW1, PW4 is father of Ashok Kumar and PW1 Sushil Kumar.

F In view of the opinion of third learned judge the appeal was dismissed by the High Court, The judgment and order of High Court is under challenge in this appeal. We have gone through the opinion of the third learned Judge. Unfortunately, except a brief reference to the testimony of PW2, the said opinion does not show that the learned judge independently considered the testimony of other eye-witnesses, in particular-PW1 and PW3. The judges in different dissenting opinions have given detailed reasons, for and against the acceptance of version as deposed by these eye witnesses. The third learned Judge, under these circumstances, was required to independently examine the matter and express his opinion. It is not permissible to only or merely indicate the agreement with one or other view without giving reasons therefore.

H

Therefore, Mr. BB Singh, learned counsel for the appellant is right in his submission that the matter deserves to be remanded to the High Court so that it may be heard afresh by a third judge so as to make available to the parties a reasoned opinion showing that the relevant evidence and submissions that may be urged by counsel for the parties have been independently considered. We refrain from expressing any opinion on the merits of the case and make it clear that merits have not been examined by this Court which aspect would be considered by the High Court (third Hon'ble judge) in accordance with law.

In view of the fact that the appellant is in custody for a long period, we request the High Court to decide the matter expeditiously and, if possible, within a period of four months.

For the aforesaid reasons, we set aside the judgment and order of the High Court in Cr1. A.No.2091/80 and remit the matter to the High Court in terms aforestated. The appeal is disposed of accordingly.

R.P.

Appeal disposed of.