
(2012) 07 AHC CK 0056
In the Allahabad High Court
Case No : Criminal A. No. 2000 of 1983

Mahendra and Others

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 23-07-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2012) 3 ACR 3074

Hon'ble Judges : Vinod Prasad, J; Surendra Kumar, J

Bench : Division Bench

Advocate : Anil Mullick, Sunil Singh and R.P. Singh, for the Appellant;

Final Decision : Dismissed

Judgement

Vinod Prasad, J.—This appeal, preferred by three appellants Mahendra A-1, Mohari A-2 and Krishna Pal A-3, emanate from the judgment and order dated 27.8.1983 passed by VIIIth Additional Sessions Judge, Ghaziabad, in S.T. No. 269 of 1981, State v. Mahendra and others, by which learned trial Judge has convicted the appellants for the murder charge u/s 302/34, I.P.C. and has sentenced them to imprisonment for life therefor. Background facts, germinating this appeal, were contained in the written F.I.R., Ext. Ka-1, and later on elaborately divulged by the informant Hoshiyar Singh P.W. 1, in the concerned Sessions Trial, were that the informant, his two sons Mangey Ram (deceased) and Khub Singh (scribe), alongwith two appellants A-1 and A-2, were co-villagers, all of them being residents of village Dariyapur P.S. Bahadurgarh, district Ghaziabad. Third appellant Krishna Pal was a resident of another village Bharna, P.S. Simbhawali, district Ghaziabad. On 11.11.1980, Mangey Ram (deceased) alongwith Ranvir, P.W. 2, had assaulted A-2 regarding, which an F.I.R. was lodged against them. Following day of the said incident, A-1, had also lodged an F.I.R. against the deceased for assaulting and be labouring him. Some fifteen or sixteen days later on, present incident occurred, when in the intervening night

of 27/28.11.1980 at about 12 p.m., mid night the three appellants, all carrying fire arms, accompanied with a fourth unknown companion, who was armed with a lathi, came to the informant's thatched abode within his pen, where the informant and the deceased were sleeping on two different cots. A lamp was lighting in a wall hole at that moment. Sudden bang sound woke up the informant who saw all the accused standing near the cot of Mangey Ram deceased. Informant meddled them and raised shouts, on which, the assailants shot dead Mangey Ram by causing him fatal fire arm injuries on his chest and hand. Hearing informant's shrieks and gun shots, neighbours Ranvir P.W.-2, Onkar and other co-villagers arrived at the incident scene, who all had witnessed the murder and had spotted the assailants. Executing murder accused had retreated from the murder spot and eloped in darkness.

2. Informant Hoshiyar Singh, P.W. 1, dictated F.I.R., Ext. Ka-1, to his another son Khub Singh, who scribed it and then informant P.W. 1 measured a distance of 16 km. to P.S. Bahadurgarh. where he lodged his F.I.R., next day morning at 6.30 a.m. as crime No. 181 of 1980, u/s 302, I.P.C. against the three named accused appellants and an unknown accused.

Constable clerk, Dalbir Singh registered the crime by preparing chik F.I.R. Ext. Ka-14 and G.D. entry Ext. Ka-15, which has been proved by constable Ram Prakash P.W. 6.

3. S.I. Ramraj P.W. 5, engineered the investigation into the crime which was registered in his presence. First of all Investigating Officer performed inquest on the deceased's cadaver, prepared inquest report, Ext. Ka-3 and other relevant documents Exts. Ka-4 to Ka-6. Lamp, which was alleged to be burning at the spot during the murder was checked by the Investigating Officer, who, thereafter, handed it over to the informant P.W. 1 after preparing it's seizure memo Ext. Ka-7. Investigating Officer had also collected pieces of blood stained rajai (Ext. 1), blood stained tahmad (wrapper) Ext. 2, blood stained quilt (Ext. 3), blood stained ties of the cot (Ext. 4), six pellets underlying the cot (Ext. 5), blood stained and plain earths (Ext. 6 and 7) from the incident place and had prepared a single recovery memo in respect of these recoveries vide Ext. Ka-8. Impression seal Ext. Ka-9. After finishing inquest, cadaver of the deceased was sealed and seal impression Ext. Ka-10 was prepared and the corpse was handed over to Constables Rakesh Kumar, P.W. 4, and Const. Meharban Singh, to be carried to the mortuary for autopsy. Subsequent thereto, P.W. 5, interrogated informant and other eyewitnesses. Some extracts of interrogatory statements of Ranvir P.W. 2 are Ext, Ka-11. Investigating Officer had also conducted spot inspection and had sketched site plan map Ext. Ka-12 and concluding investigation had charge-sheeted the appellants on 7.1.1981 for offences u/s 302/34. I.P.C. vide Ext. Ka-13.

4. Autopsy on the dead body of the deceased was conducted on 29.11.1980 at 4.05 p.m. by Dr. Anil Kumar, M.O.M.H.G. Hospital. Ghaziabad. P.W. 3. According to the doctor's estimation deceased was 22 years of age and quarter to three

days had lapsed since his death. His eyes and mouth were closed, he had an average built body, on which rigorous mortis was present. In the stomach there was semi digested food whereas large and small intestines contained gasses. Cause of the deceased death was shock and haemorrhage because of sustained injuries. Following ante-mortem injuries were noted by the doctors in deceased's post-mortem examination report Ext. Ka-2:

A.M. injuries:

(1) Multiple gunshot wound (as fire arm injury) on Lt side chest in the area 3.5 cm. x 3 cm. lateral to mid line and 3-1/2 cm. above the nipple having tattooing and blackening with blood clots as wound of entry having no exit.

(2) Lacerated wound aneroid posteriorly 10 cm. x 12 cm. tendon deep with multiple compound fracture

(3) Lacerated wound on the Lt. hip joint skin deep 6 cm. x 3 cm.

Internal examination of the deceased had further revealed that his first and second ribs had fractured, left side heart and lung were punctured, and both right and left lungs cavities contained blood.

5. Charge sheeting of all the accused resulted in registration of Criminal Case No. 114 of 1981, State v. Mahendra and others, against the accused in the committal Court of C.J.M., Ghaziabad, who found the offences triable by the Court of Sessions and, therefore, committed the case to the Sessions Court for trial on 29.9.81. After receipt of the case filed before Sessions Judge, Ghaziabad, S.T. No. 269 of 1981, State v. Mahendra and others, was registered in the Sessions Court.

6. Learned trial Judge, on 13.8.1982, charged all the three accused-appellants u/s 302/34, I.P.C., which charges were abjured by them, and they claimed to be tried and consequently, to bring them to books for the committed crime. Sessions trial procedural was undertaken.

7. Prosecution in it's effort to cement accused guilt relied upon oral testimonies of six witnesses, out of whom informant Hoshiyar Singh P.W. 1 and Ranvir, eye-witness named in the F.I.R., P.W. 2 were the only two fact witnesses. Post mortem examination Dr. Anil Kumar P.W. 3, constable Rakesh Kumar, who had carried the body to the mortuary alongwith constable Meharban All P.W. 4, Investigating Officer, S.I. Ram Raj P.W. 5 and constable Om Prakash P.W. 6 were formal witnesses. Besides, relying upon aforesaid oral evidences, prosecution has also relied upon various documentary, evidences, which have already been referred to hereinabove, as Exts. to establish it's case.

8. In their statements u/s 313. Cr.P.C., A-1 and A-2, besides stating common defence for their false implication had stated that since they had lodged an F.I.R. against the deceased and P.W.-2, they were falsely implicated in the present incident, which, according to them, had occurred in jungle and nobody seen the

incident. A-3 pleaded that since he was witness against the deceased in the F.I.R. lodged by A-2, therefore, he has been framed-in, by the informant in the present incident.

9. VIIIth Additional Sessions Judge, Ghaziabad, vide impugned judgment and order dated 27.8.1983, held that accused appellants' guilt was anointed without any doubt and therefore, convicted the appellants of the framed charges u/s 302/34, I.P.C. and, looking to their young age sentenced them to life imprisonment. It is this conviction and sentence, which is in question and under challenge in the instant appeal filed by the appellants.

10, On the up-till now narrated facts, we have heard Sri Sunil Singh and Sri R.P. Singh, learned advocates for the appellants and Sri N.K.S. Yadav, learned A.G.A. for the respondent-State.

11. Assailing the impugned judgment of conviction and sentence, appellants' counsel submitted before us that the prosecution had not been able to substantiate its charge beyond all reasonable doubt, as the incident had occurred in the dead hour of the wintry night when nobody could see the incident. The story of lamp lighting at the spot is a cooked up story and testimonies of the informant P.W. 1 is unnatural, unrealistic and unreliable. He had no opportunity to spot the assailants in that dark night. Site plan indicates that the source of light was emanating from the opposite direction and, therefore, only back of assailants could be seen by the informant and in the wintry night, it would have been impossible for the informant to identify and locate the assailants. It was next argued that ocular testimony is at variance with the medical testimonies as postmortem examination report reveals that injury Nos. 2 and 3, sustained by the deceased, could not have been caused by firearms. It is, therefore, suggested that P.W. 1 had not witnessed the incident and after detection of the dead body next day morning, that the prosecution story was fabricated and F.I.R. was lodged implicating appellants because of the previous enmity. It was further urged that informant was not a witness of the incident and had he been present at the incident scene, he would not have been spared to disclose identity of perpetrators of the murder. Next, it was argued that the sole witnesses who had supported the prosecution case is informant P.W. 1, who is the father of the deceased and, therefore, is related, inimical and a partisan witness on whose depositions no reliance can be placed. He is not an injured and his presence at the spot has not been established beyond doubt. Second fact witness Ranvir P.W. 2 turned hostile and did not support the prosecution case at all. Another eye-witness named in the F.I.R. was not examined by the prosecution to lend credence to its story and consequently, prosecution had not been able to substantiate its charge against the appellants. It is further submitted that the lamp was alleged to have been kept in wall hole (Ala) and the light emanating from it will not sufficiently illuminate incident scene facilitating identification of the assailants in a wintry night, when fog and mist must have been present. Since prosecution has failed to offer any explanation of

injuries No. 2 and 3, therefore, it's story cannot be accepted as gospel truth harangued learned counsel. According to the doctor, injury No. 2 was caused from a distance of 10 or 12 paces whereas, injury No. 1 to the deceased was caused from a point blank range as the said injury had blackening and tattooing present in it and injury No. 3 was not caused by fire arm at all. Primarily, on the aforesaid submissions, it was urged that case against the appellants accused has not been established beyond all reasonable doubt and they are entitled to acquittal and consequently instant appeal be allowed, appellants be acquitted and they be set at liberty.

12. Learned A.G.A., arguing conversely, submitted that the father had no reason to fabricate a story against the appellants who had murdered his own son. F.I.R. was lodged after the incident without any delay at 6.30 a.m. following morning after covering a distance of 16 kilometres and hence, there was no occasion for the prosecution nor there was enough time for it to fabricate a story and therefore, prosecution allegations against the appellants are un-tutored and are creditworthy, authentic and confidence inspiring. It was further submitted that the postmortem examination report does not castigate the ocular version. According to the doctor, injury Nos. 1 and 2, both, were caused by firearms. Accused themselves have got elicited through cross-examination that injury No. 2 was the outcome of firearm shot and therefore, they cannot be permitted to argue to the contrary and take a summersault. It was next submitted that presence of blood and the pellets and the incident scene unerringly, without any doubt, establishes the place of the incident and, consequently defence of the accused that the incident had occurred in jungle is un-credit-worthy. It was further submitted that the sole testimony of the father, who was present at the time of the incident and who had no motive to falsely implicate the accused appellant is sufficient enough to dismiss the appeal. Ranvir P.W. 2, turned hostile ostensibly because he was an accused in the F.I.R. lodged by the appellants and, therefore, it transpires that he colluded with the accused and deposed a mendacious version although, during whole investigation he had countenanced the prosecution case in it's entirety. It was, therefore, submitted that the appeal lacks merit and deserves to be dismissed.

13. We have considered the rival submissions and have perused the trial court record critically. From our such an exercise, we come to the conclusion that the prosecution story of the incident taking place in the dead hour of the night within the pen in front of the house of the informant is a true version, well cemented by attending circumstance. Presence of blood at the spot, which remains unchallenged, especially on the cot and underneath it establishes that the Incident must have occurred at that place and nowhere else. This conclusion is further supported by the fact that the six pellets were also found from beneath the cot. There was no other place, which was suggested by the defence where the deceased could have been murdered. Informant is an eye-witness to the incident and during Investigation, he was well supported by P.W. 2 as well, who for the ostensible reasons, had turned hostile during the trial. There is also no

doubt that the deceased had lost his life because of sustained firearm injuries from point blank range. His post-mortem examination report clearly indicates that his ribs were fractured, heart was lacerated and both lungs were filled with blood. He had died instantaneously at the spot. From cross-examination of the doctor P.W. 3, defence has not been able to dislodge the prosecution story on the said score at all. In fact, the doctor has not been seriously challenged in that respect and, therefore, there is no difficulty for us to conclude that the deceased had lost his life because of the sustained injury. Appellants' counsel harangued forcefully the contention that so far as injury Nos. 2 and 3 are concerned, they were not caused by firearm as there was absence of blackening and charring and other facts also indicated those injuries not to have been caused by firearm and, therefore, ocular evidence is contradicted by the expert opinion. We have carefully considered the aforesaid submissions and have gone through the evidence of the doctor P.W. 3 on this score. When the said witness was in the witness box and cross-examined by the accused, then they themselves got it elicited from him that the injury No. 2 could have been caused by firearm. It seems that because the said wound had a big dimension and the seat of the injury was at such a part of body that possibility of pellets being found embedded inside the injury was very remote. More over accused had not wielded standard weapons. What was the nature of country made pistols, what was the shape size and contents of the cartridges all are not known. Since the accused themselves got injury No. 2 explained from the doctor, we cannot confer any benefit on them contrary to the evidence on record. In such a view, criticism by the appellants' counsel regarding ocular version being contrary to the medical evidence is hereby repelled. Stomach of the deceased had a pasty food and both of his intestines had gases without any food. This also indicates that the incident must have taken place on around the mid night as normally in the villages, the people take their meal round 8 or 9 p.m. The estimation of the time of death recorded by the doctor, i.e., one and three forth of a day also supports the prosecution story of the incident taking place as alleged by it. There was a fourth accused also, which was armed with lathi and, therefore, injury No. 3 sustained by the deceased could have been caused by that accused. The incident must have not lasted for a long time. It must have been over in quick succession. Those assailants, who had chosen a dark wintry mid night to commit a murder will not stand at the spot for a very long time to execute the incident. At this point, we take up another castigation by appellants' counsel that informant had no opportunity to see the assailants. In this respect, we are of the view that the two of the assailants A-1 and A-2 were residents of the same village. They had lodged an F.I.R. against the deceased on two successive days. It has been stated by the informant P.W. 1 in his cross-examination dated 7.3.1983 that the Incident night was not a pitch dark night. In such a view, light of the lamp burning at the spot alongwith the natural faint light available at the time of the incident must have been sufficient for a known man to identify the assailants and consequently, there was no difficulty for the informant P.W. 1 to identify and locate those two assailants, A-1 and 2. Further, defence has not challenged P.W.

1 regarding his statement that prior to the incident, he had already woken up. If this statement of the informant is taken to be correct, he had ample opportunity to identify the accused from their physic, attire and other physical appearance, as they were very well known to him. In such a view, we are of the opinion that so far as A-1 and A-2 are concerned, prosecution had been able to substantiate their participation in the incident free of all doubts. A-1 and 2 also had enough animuses against the deceased to annihilate him and commit the crime.

14. However for Krishna Pal, A-3. we are of the opinion that the prosecution had failed to anoint his guilt beyond all doubts. Firstly, A-3 Krishna Pal is a resident of another village. He had absolutely no animus or motive to commit the crime and to be present at the scene of the incident at that dead hour of the night. There was no brawl or assault between him and the deceased. His presence seems to be uncertain also because three persons are alleged to have been armed with firearms but the deceased had sustained only two injuries, meaning thereby that at least one of them did not fire or in any case prosecution has failed to prove conclusively and convincingly that three shots were fired during the incident. Even in absence of A-3, the incident, as alleged by the prosecution, could have been executed with consistent corroborative medical evidence as alleged by it. No specific role has been assigned to A-3 at all. Prosecution story that all the three accused armed with fire arms shot at the deceased is belied by autopsy report. A-3 had not enough reasons to be part of murder crime, as only being a witness in one of the cases against the deceased was not enough reasons for him to associate himself with other accused. Light on the spot, albeit was sufficient to recognise co-villagers but in our opinion was not sufficient to identify a non co-villager and it is because of this reason that fourth accused could not be identified by the informant nor he could state his physical appearances. Since, we find that A-3 had absolutely no motive, there is no specific role against him and that he is a resident of another village and his non-participation would not affect prosecution case at all, and that autopsy report does not establish at all firing made by three accused, that we are of the view that prosecution evidences in his respect is extremely dicey which does not satisfy us regarding his involvement in the incident. There is no other fact witness, but for informant P.W. 1, who could lend credence to the prosecution version about his participation in the crime, as Ranvir (P.W. 2) had turned hostile. Informant had not been able to disclose why A-3 will associate himself with other accused persons and will commit the crime as there is total absence of evidence that prior to the present incident A-3 had associated himself with other accused in any other crime. In absence of any convincing credible material against appellant, A-3, we are in grave doubts regarding acceptance of the prosecution version in his respect and, therefore, so far as A-3 is concerned, we would like to confer benefit of doubt on him.

15. So far as the criticisms that there is only a single testimony against the appellants and that too of the father, who is. a related, inimical and partisan witness, is concerned, we are of the opinion that on the said score, prosecution

case cannot be negated and thrown overboard as it is not the quantity but quality of evidences and it's confidence inspiring nature that matters. Merely, because of relationship, the depositions of the father cannot be ignored nor can he be dubbed as an untruthful and unreliable witness. P.W. 1 had no reason to falsely implicate appellants A-1 and 2, In the case of the murder of his own son sparing the real assailants. He had given a confidence inspiring and truthful narration about the happening of the incident and we have no doubt in our mind that his testimony cannot be discarded to acquit those accused against whom there exist confidence inspiring creditworthy evidences anointing their guilt. Resultantly, the appeal is allowed in part. Appeal of appellant Krishna Pal (A-3) is allowed. He is acquitted of the charge u/s 302/34, I.P.C. and impugned judgment in his respect is set aside and he is set at liberty. Krishna Pal is on bail, he need not surrender, his personal and surety bonds are hereby discharged.

Appeals of rest of the two appellants Mahendra (A-1) and Mohari (A-2) against their conviction and sentences recorded by the learned trial Judge in the impugned judgment, are dismissed in full and their convictions and sentences are hereby affirmed. These appellants are on bail. their personal and surety bonds are cancelled and they are directed to be taken into custody to serve out remaining part of their sentence.

Let a copy of this judgment be certified to the trial court for it's intimation.