
(2012) 03 UK CK 0094
In the Uttarakhand High Court
Case No : Criminal Appeal No. 276 of 2002

Manoj	Vs	APPELLANT
State of Uttaranchal		RESPONDENT

Date of Decision : 06-03-2012

Acts Referred:

Penal Code, 1860 (IPC) — Section 302

Citation : (2012) 2 UC 1298

Hon'ble Judges : Barin Ghosh, C.J.; Umesh Chandra Dhyani, J

Bench : Division Bench

Final Decision : Allowed

Judgement

U.C. Dhyani, J.—In this case, criminal law was set into motion on the complaint (Ext. Ka-1) dated 05.04.1995 of Manoj Kumar s/o Hem Chand Chaturvedi r/o Ahmadpur within the jurisdiction of P.S. Jwalapur, District Haridwar. Chik FIR (Ext. Ka-3) was lodged on 05.04.1991 at 9:25 p.m. at P.S. Jwalapur which was registered as crime No. 115/91 u/s 302 IPC. Occurrence took place on 05.04.1991 at 6:30 p.m. The distance between place of occurrence and P.S. concerned was 9 k.m. and hence there appeared to be no delay in lodging FIR.

2. It was the son of deceased who initiated proceedings by filing complaint (Ext. Ka-1). Prosecution story was that on 05.04.1991 in the evening when informant along with his father were coming from the shop of Chandrabhan and he was approx. 10-15 paces behind his father, who when reached in front of house of Subey Singh, accused Subey Singh, Om Prakash, Baldhar and appellant Manoj came out of his house. Subey Singh and Baldhar caught hold of Hem Chand (victim). Om Prakash exhorted Manoj to kill him. Appellant Manoj s/o Subey Singh fired on victim with country made pistol. The bullet hit chest of victim. Victim fell on ground no sooner bullet hit him. On raising alarm co-villagers Atar Singh and Dharampal Singh came on the spot. Assailants ran away to their houses. Informant brought his father to Government Hospital, Haridwar in a conveyance only to be informed that his father was declared "brought dead". A

dispute of land was going on between the deceased and assailants. A scuffle had also taken place in the past.

3. Accused/appellant Manoj s/o Subey Singh was convicted by learned trial court for the offence punishable u/s 302 IPC after the conclusion of trial on 28.10.2002. He was sentenced to undergo imprisonment for life. He was also sentenced to pay a fine of Rs. 3000/- , in default of which he was directed to undergo 3 months further imprisonment. Aggrieved against the impugned order dated 28.10.2002, appellant Manoj s/o Subey Singh preferred present appeal. Co-accused Baldhar, Subey Singh and Om Prakash were acquitted by learned trial court giving them benefit of doubt.

4. P.W.1 Manoj Chaturvedi was the son of deceased Hem Chand Chaturvedi who was pradhan of village Ahmadpur Grunt in the year 1991. The incident took place on 05.04.1991. P.W.1 Manoj Chaturvedi said that he was coming along with his father from the shop of Chandrabhan. The incident took place at 6:30 p.m. When his father reached in front of house of accused Subey Singh and he (son) was following his father, accused Subey Singh, Om Prakash, Baldhar and Manoj came out of their houses. Manoj had country made pistol. Subey Singh and Baldhar caught hold of victim, Om Prakash exhorted Manoj to shoot deceased. Accused/appellant Manoj fired a shot which hit the victim on his left side chest. He fell on the spot. Atar Singh and Dharampal Singh were coming from the front. They saw incident. Victim Hem Chand Chaturvedi was taken to Government Hospital Haridwar where he was declared "brought dead". P.W.1 Manoj Chaturvedi got the complaint (Ext. Ka-1) written by one Chandra Shekhar Arya. This witness proved his signatures on report (Ext. Ka-1), which was filed in P.S. Jwalapur. Head Moharrir enquired from him the time of incident, to which he replied the same to be 6:00 p.m. The same was scribbled in chik FIR. All the four accused belonged to his village. Investigating Officer took his statement, visited place of occurrence. Blood dropped there. A sample of blood was taken by Investigating Officer, who also prepared site plan and prepared inquest report. Son of deceased identified his signatures at place "X" on inquest report. The son deposed that a litigation was going on regarding 100 beeghas of land between his father and accused persons.

5. In cross-examination, P.W.1 Manoj Chaturvedi disclosed the details of pending cases. He also admitted that a criminal case was pending against him in District Court Haridwar.

6. Coming to the incident, P.W.1 Manoj Chaturvedi said that there was only one fire which pierced Hem Chand Chaturvedi's body. He was bleeding profusely. His hands and clothes were stained when he tried to give support to his injured father. He did not show his blood stained clothes to Investigating Officer. He went to Police Station and Hospital in the same (blood stained) clothes. It took him half an hour to make arrangement for conveyance. Many a people were with him when he went to hospital. Dharampal son of Mahavir was with him. P.W.2 Dharampal Singh son of Sukkhan Singh was not with him. He was coming from

shop of Chandrabhan when the incident took place. He along with his father had gone to Chandrabhan to settle the account. Chandrabhan was one of the witnesses of inquest report. When assailant fired on his father, this witness was at a distance of 4-5 paces. Victim was fired in front of house of Subey Singh. Dharampal and Atar Singh were coming from the front. Baldhar caught hold of victim's left arm and Subey Singh caught hold of his right arm. Om Prakash was standing before victim and Manoj appellant was standing parallel to him. Victim was 5 feet 7 inches in height.

7. Speaking about conveyance, P.W.1 Manoj said his father was taken to hospital in a metador. It took approx. 1 1/2 hour to reach Haridwar Hospital. He admitted that there was a P.H.C. in Bahadarabad. He also admitted that there was a police outpost in Bahadarabad but that was not a reporting outpost. They reached Haridwar via Jwalapur. He left dead body of his father in hospital and went to police station where he went alone. He did not know Chandra Shekhar Arya who was scribe of report. He did not see accused persons in the village after the incident. Dharampal son of Mahavir, Dharampal son of Nanda and Dal Singh met him in hospital. A copy of chik FIR was provided to him in the police station. A copy of chik FIR was with him when he reached hospital again. He remained in the hospital till inquest report was prepared. He denied that he did not witness the incident. Learned counsel for the appellant Manoj submitted that presence of P.W.1 Manoj on the spot was highly doubtful. It was contended that he had enough time to intervene and save his father. He did nothing to do so. He was a few steps behind his father when accused persons accosted him (his father). The deceased was taken to hospital by Dharam Singh at 8:30 p.m. If P.W.1 Manoj would have taken the deceased to hospital, his name ought to have been there. He was aged about 26 years at the time of occurrence. He claimed that he was coming back with his father after settling the account of Chanderbhan at his shop. Chanderbhan was not examined by prosecution to prove this fact. Investigating Officer admitted recording of statement of Chanderbhan. Investigating Officer also admitted that Chanderbhan did not tell him that deceased came to his shop. P.W.1 Manoj also claimed that his clothes and hands were stained with blood but they were not taken in custody by Investigating Officer. It was also submitted on behalf of appellant that blackening was a remote possibility. P.W.1 Manoj said in cross-examination that at the time of inquest, Investigating Officer was told about FIR, a fact which was denied by Investigating Officer. It was also contended that FIR is ante timed.

8. P.W.1 Manoj was recalled for further cross-examination. Many a questions were asked regarding the land under litigation and cases pertaining thereto. He denied that Head Moharrir did not ask question about time of incident. He told Investigating Officer about fire on his father but did not tell about the weapon. He also denied that FIR was not lodged till such time inquest was prepared. A suggestion was also put before P.W.1 Manoj that the incident took place in the dark and nobody saw the incident to which this witness denied.

9. P.W.2 Dharampal Singh supported prosecution story. He said that on 05.04.1991 at 6:30 p.m. Subey Singh, Om Prakash, Manoj and Baldhar came out of their residence. Subey Singh and Baldhar caught hold of Hem Chand Chaurvedi, Om Prakash exhorted Manoj to shoot him and appellant Manoj fired a shot which hit the deceased and pierced his chest. The occurrence was witnessed by Manoj, Atar Singh and he himself. Hem Chand fell on the spot. Accused persons went away to their houses. Hem Chand was taken to hospital by Manoj.

10. In cross-examination, P.W.2 Dharampal Singh denied that inquest was conducted in his presence. Many a questions were asked about litigation going on in courts at Haridwar to this witness. He admitted that a case of embezzlement of money of co-operative society was instituted against him. Questions were also asked to him regarding flour mill in his village and election of pradhan when Hem Chand contested the election. No details of the same are being given here, as the same will not serve any purpose. Investigating Officer took his statement in the night following the incident. When this witness saw the incident, he was near the residence of accused Subey Singh. He was coming from the side of crusher. Questions were also asked to him regarding boundaries of Subey Singh's house. He said that accused persons caught hold of Hem Chand on the southern portion of the door of Subey Singh which was situated at a distance of 10-15 feet of Raju's house. Hem Chand was fired upon at this juncture. Hem Chand fell on the road. Northern portion of Subey Singh's house was situated at a distance of 15-20 feet. Hem Chand was shot dead. There was a neem tree near the house of Satpal. Satpal's house and Subey Singh's house were opposite to each other. He saw faces of all the accused persons. This witness gave respective positions of accused persons when the incidence took place. Appellant Manoj fired on Hem Chand. One fire was shot at. He denied that the occurrence took place after 8:00 p.m. and not at 6:30 p.m. The bullet pierced the body of victim.

11. P.W.3 Dr. Om Prakash Sharma, Medical Officer, District Hospital Haridwar was posted on the same post on 06.04.1991. He conducted post mortem on dead body of Hem Chand on 06.04.1991 and found following ante mortem injuries:

1. Firearm wound of entry. Circular in shape 0.7 cm diameter on left side of chest at 9:00 o'clock position and 4.5 cm away (from) left nipple. Wound direction back ward. Margins inverted, Blackening present.

2. Firearm wound of exit 3 cm x 1 cm on left side of chest on pist 8.0 cm below left peopull. Margins exverted.

3. Abrasion 3 cm x 2 cm. 1 cm below injury No. 2.

4. Multiple abrasions, superficial round abrasions in area of 18 cm x 12 cm are present on left side back chest. All are black. Probably caused by gunpowder.

12. Doctor also proved his report (Ext. Ka-2). Cause of death was shock due to hemorrhage due to ante mortem firearm injury.

13. In his cross-examination, P.W.3 Dr. Om Prakash Sharma admitted that injury

No. 1 & injury No. 4 could not be sustained by one firearm. Similarly injury No. 2 and injury No. 4 could not be sustained by a single fire. Doctor was categorical in his statement to say so. Injury No. 4 appeared to have been caused by gunpowder. According to eyewitnesses only one fire was struck. In other words there was single fire and doctor opined that injury nos.1 & 4 as also injury nos.2 & 4 could not be sustained by single fire. Learned trial court in page No. 14 of the judgment agreed with medical evidence but did not agree with the opinion of the Medical Officer wherein the Medical Officer said that injury nos.1 & 2 as also injury nos. 2 & 4 could not be sustained by single fire. Said remarks by learned trial court are not acceptable in view of reasons given in later part of the judgment.

14. P.W.4 Head Constable Jaipal Singh prepared chik FIR and G.D. P.W.5 S.I. Rajendra Kumar prepared inquest report. P.W.6 S.I. Anil Rana investigated the case. P.W.7 Malkhana Moharrir H. Dixit denied receipt of clothes of deceased. P.W.8 Head Constable Digvijay Singh also denied having received clothes of deceased. P.W.9 Head Moharrir Madanpal Singh too denied having received clothes of deceased as Malkhana Moharrir and P.W.10 Constable Rajpal Singh said about G.D. No. 41. They are formal witnesses.

15. P.W.4 Head Constable Jaipal Singh proved chik FIR (Ext. Ka-3) and copy of G.D. (Ext. Ka-4) but admitted in cross-examination that the signatures of complainant were not obtained after question was asked to the complainant and reply was taken from him. No reference of the same was recorded in G.D. either, although he denied that chik FIR and G.D. were ante timed and ante dated.

16. P.W.5 S.I. Rajendra Prasad who prepared inquest report (Ext. Ka-5) said in cross-examination that dead body of Hem Chand was submitted in hospital at 8:30 p.m. on 05.04.1991. He was not aware whether Manoj Kumar son of Hem Chand Chaturvedi was also a witness to inquest or not (page No. 4 of cross-examination of P.W.5). Witnesses did not tell as to which weapon was used.

17. P.W.6 S.I. Anil Rana, who was the Investigating Officer of the case admitted in cross-examination that criminal case was registered in his presence. He did not remember whether clothes of informant were stained by the blood or not. Had the clothes been stained with blood, he would certainly have taken those clothes in his custody. It means that the clothes of informants were not stained with blood. That puts a question mark on the presence of P.W.1 Manoj Kumar at the time of incident.

18. P.W.6 S.I. Anil Rana admitted in cross-examination that clothes of deceased were not sent for chemical analysis. Learned counsel for the appellant submitted that there was no evidence regarding receipt of clothes of victim. One witness viz. D.W.1 Chandra Shekhar Arya was produced in defense, whose wife ran a school in the house of deceased Hem Chand Chaturvedi. He came to know in the night at 9:30 p.m. that Hem Chand was dead. When he reached police station at 11:00 p.m., police told him that FIR was not lodged. He came to know that since

Manoj Kumar son of Hem Chand had not come therefore, FIR could not be lodged. The next day at 7:00 a.m. when D.W.1 Chandra Shekhar Arya reached hospital son of deceased had come. Then he along with Manoj and Dharam Singh went to police station. D.W.1 Chandra Shekhar Arya wrote complaint on the dictation of Inspector. Defense witness proved the complaint (Ext. Ka-1) to be in his own handwriting and said that the same was scribbled on next day of death at 10:00 a.m. In cross-examination he said that his wife ran a private school in the house of Hem Chand Chaturvedi. He went to police station in night by his own scooter on hearing the news of death of Hem Chand Chaturvedi. He reached hospital at quarter to 12 O'clock. He reached police station Jwalapur in the morning by his own scooter. Manoj also reached P.S. Jwalapur in the morning. He denied that he wrote complaint on 05.04.1991 at 9:00 p.m. He was under the influence of Inspector police. Thus, D.W.1 was the scribe who said two things:

a) It was written on 06.04.1991 and not on 05.04.1991.

b) It was written at the instance of Police Inspector and not at the instance of informant.

19. When it is not in dispute that this was a person who was not produced by prosecution but by defense, deposition of scribe may not be accepted as truth. He went to police station at 11:00 p.m. wherein he was informed that FIR was not lodged. He came to know that dead body of Hem Chand was lying in G.D. Hospital, Haridwar. Since it was too late therefore, he stayed with one of his colleague Gopal Rawat. He went to hospital the next morning at 7:00 o'clock. By then Manoj had arrived. According to him FIR (Ext. Ka-1) was lodged in the morning. In cross-examination, he said that he went to police station in the night on his scooter. He reached hospital at 11:45 p.m. He said that he went to P.S. Jwalapur from hospital on his scooter in the morning. Thus it is revealed from his evidence that he went to police station, then to hospital and since it was too late therefore, he stayed with Gopal Rawat. He again went to hospital in the morning and from hospital he went to P.S. Jwalapur on scooter. Although, factum of night stay in the house of Gopal Rawat was not repeated in cross-examination, perhaps because this question was not asked to him, yet there is no corroboration that he stayed in the night with someone else. Learned A.G.A. argued that D.W.1 Chandra Shekhar was a journalist. He was not a person who could be coerced by the police to say anything. Learned A.G.A. also submitted that first injury was in 9:00 o'clock position piercing from here and going out. He submitted that the prosecution story is proved but there is no explanation of injury No. 4. Learned AGA admitted that there was only one fire and so many injuries were there.

20. This Court is hesitant to accept prosecution story primarily because of conflict between ocular evidence and medical evidence. Injury No. 4 sustained by victim goes completely unexplained. Multiple superficial round abrasions in are of 18 cm x 12 cm were found present on back of left side chest. All were black. According to Doctor they were probably caused by gunpowder. Doctor in his

testimony said that injury No. 4 appeared to have been caused by gunpowder. He was hesitant to say whether injury No. 4 was sustained by a firearm. He could not say with certainty whether injury No. 4 was really a fire arm injury. According to Doctor injury No. 1 was sustained by a firearm and that was sufficient in the ordinary course to have caused death of victim. Injury No. 1 was fire arm wound of entry and injury No. 2 was fire arm wound of exit. Injury No. 3 was in the form of abrasions and the seat of injury was below injury No. 2. So far as these three injuries were concerned they were definitely caused by fire arm. Since there was one wound of entry and one wound of exit coupled with abrasions, there is no hesitation in coming to the conclusion that these injuries were sustained by single fire but what about injury No. 4? When Doctor was recalled for cross-examination, he categorically said that injury No. 1 and injury No. 4 could not be sustained by single fire arm. He was also emphatic in saying that injury No. 2 and injury No. 4 could not be sustained by single fire. The area of injury No. 4 was quite wide (18 cm x 12 cm) and that too on back of chest. All were black and probably caused by gun powder. How could this injury be sustained if single fire was struck ? It appears that the incident did not take place in the manner it was projected by the prosecution through prosecution witnesses. Learned trial court justified injury No. 4 perceiving the same to be on left side of chest. He forgot to see that injury No. 4 was sustained in a wide area on the back of chest. It was ventral side and not dorsal side. How could this injury No. 4 be explained ? Suspicion thus creeps in the manner of assault and firearm thus used. Here lies material contradiction in ocular evidence and medical evidence. Learned trial court acquitted 03 other accused persons on the ground that they had no active role to play and granted them benefit of doubt. The ground which was taken by the learned Additional Sessions Judge while acquitting 03 other accused was that appellant could not have killed victim had two of them caught hold of victim's hands because there were chances that other accused also might have sustained injury in the process. Appellant Manoj did not want to injure them. He proceeded on the assumption that appellant Manoj had really fired on victim. One set of accused persons was being acquitted by learned Additional Sessions Judge and appellant being convicted on the basis of same evidence. It is difficult to accept the rationable behind such judgment. This Court is unable to accept the findings arrived at by learned trial court.

21. Time of incident was not mentioned in the complaint (Ext. Ka-1) and it was written later on in chik FIR (as 6:30 p.m.). According to informant his hands and clothes were stained in blood but no such blood stained clothes were taken into custody by police. Blackening was a remote possibility if bullet was fired from a close range. Inspector denied showing of copy of FIR at the time of preparing inquest report. If P.W.1 Manoj was not present on the spot then presence of P.W.2 Dharampal also becomes doubtful. P.W.6 S.I. Anil Rana said that had there been blood stained clothes he would have taken the same in custody. Police witness (P.W.-5 S.I. Rajender Prasad) pointed out that kurta was burnt in the back. Even if everything was right for the prosecution yet there is no explanation

of injury No. 4. Even if court is inclined to believe entire prosecution story but how can it explain the infirmities in the form of unexplained ante mortem injuries in the post mortem report? There exists difference between the words "proved beyond reasonable doubt" and "appears to be proved". Since it was a case of direct evidence, accused/appellant could be held guilty on the basis of single testimony of P.W.2 Dharampal alone even if P.W.1 Manoj could be termed as "chance witness" but for the reason that eyewitness account is not corroborated by medical evidence. It is a settled law on the point that if there is variation in the eyewitness account and medical evidence, direct evidence in the form of eyewitness account shall prevail but for that, clinching evidence should be there. Unfortunately the quality of direct evidence in the instance case is not such that this court could afford to take the risk of believing such eyewitness account at the cost of fragile medical evidence. At least it will not be safe to rely upon such type of direct evidence setting aside medical evidence which did not support oral testimony in its entirety. Thus it turns out to be a case of interference in the finding of learned trial court.

22. Appeal should be allowed giving the appellant benefit of doubt.

23. The criminal appeal preferred on behalf of the appellant Manoj s/o Subey Singh is thus allowed. The conviction and sentence awarded to the appellant by the learned trial court on 28.10.2002 is hereby set aside. The accused/appellant Manoj is on bail. He need not surrender. Let the lower court record be sent back.