
(2007) 03 AHC CK 0200
In the Allahabad High Court

Mehendra (In Jail)

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 28-03-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 302, 323, 504, 506

Citation : (2007) 4 ADJ 254

Hon'ble Judges : Saroj Bala, J;Imtiyaz Murtaza, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Saroj Bala, J.—This criminal appeal has been preferred against the judgement and order dated 9.8.2005 passed by the Additional Sessions Judge, court No. 1 Saharanpur in sessions Trial No. 297 of 2000 whereby convicting and sentencing the appellant u/s 302 I.P.C. with rigorous imprisonment for life and fine of Rs. 10,000/- and in default of payment of fine to undergo rigorous imprisonment for three months.

2. Broadly stated the essential facts of the case are these:

The incident took place on 3-1-2000 at about 9 P.M. near the crusher of one Ajay pal situated in village Chaparchidi P.S. Nakud district Sharanpur. The First Information Report (Ext. Ka-8) was lodged by Narendra P.W.1, cousin brother of deceased on 4.1.2000 at 12.40 A.M. The first informant and Mahendra (deceased) had been returning home after attending the case in Court at Sharanpur. When they reached near the crusher accused-appellant and his unknown companions mounted murderous assault on Mahendra. The accused-appellant subjected the victim to assault by wielding of "Kurpa" used for preparing Jaggery. S.I. Alok Prabhakar Aswathi P.W.5 then posted at Amebehata police outpost was entrusted with the investigation of case. He visited the place of offence and prepared the site plan Ext. Ka-4. He took in police custody the "Khurpa" (Ext.1) used in the commission of offence under the memo Ext. Ka-5.

The blood smeared earth and plain earth were collected from the spot under the memo Ext.Ka-3 and Ext.Ka-4. He conducted the inquest on the dead body and prepared the inquest memo Ext. Ka-2. The letter to R.I., Challan form, photolash and report to C.M.O. Ext. Ka-10 to Ext. 13 were prepared by him during the course of inquest. The sealed body with requisite papers was handed over to C.P. Kalu Ram and Ram Pal for transportation to mortuary. After interrogating the witnesses and completing the necessary formalities, he submitted charge sheet Ext. Ka- 7 against the accused-appellant.

3. The autopsy on the dead body was conducted by Dr. Pankaj Kumar (P.W.4) and under mentioned antemortem injuries were found on the person of deceased

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(i) I.W.2 cm. X 0.5 cm. X bone deep 1 cm. above outer half of right eyebrow.

(ii) I.W. 3 cm.X 1 cm. X bone cut just above right ear pinna.

(iii) Traumatic swelling 8 cm. X 4 cm. on left temple, 3 cm. above left

(iv) Abrasions 7 cm. X 2 cm. in front of middle of right arm.

(v) Multiple abrasion in an area of 21"cm. X 6 cm. on back and outer part of right forearm.

(vi) Multiple abraded contusion in an area 28 cm. X 8 cm. in front of lower part of right side chest.

(vii) Abrasion 1 cm. X 0.5 cm. on top of left shoulder,

(viii) Abrasion 4 cm.X 0.5 cm. in left mid axillary line 11 cm. below left axilla,

(ix) Abrasion 2 cm.X .0.5 cm. on medial aspect of left forearm 6 cm. below elbow.

4. The right temporal bone and left parietal bone were found fractured. The brain and membranes were lacerated. The cause of death was coma as a result of antemortcm injuries. The postmortem certificate is Ext. Ka-3.

5. The accused-appellant was charged by the Sessions Judge Sharanpur for the offence punishable u/s 302 I.P.C. to which he pleaded not guilty and claimed to be tried.

6. The prosecution examined Narendra, the first informant (P.W.I), cousin brother of deceased. Bijendra (P.W.2), Sethpal (P.W.3) cited as eye witnesses turned hostile. Dr. Pankaj Kumar (P.W.4) conducted autopsy and S.I. Alok Prabhakar Awasthi (P.W.5) is the investigating officer.

7. The defence was of total denial of accusations. Ajab Singh (D.W.1) was examined in defence to prove previous animus leading to false implication of accused-appellant.

8. The trial court placing implicit reliance on the testimony of Narendra (P.W.I) recorded its findings, convicted and sentenced the accused-appellant.

9. We have heard Shri N.I. Jafari, learned Counsel for the appellant, Shri M.S. Yadav, learned A.G.A. from the side of the State and have perused the summoned original record.

10. The contentions advanced on behalf of the appellant are:

- (i) The First Information Report was lodged after inordinate delay of four hours;
- (ii) the uncorroborated testimony of Narendra (P.W.I) is unworthy of credence being tainted with falsehood;
- (iii) the medical evidence is inconsistent with prosecution version;
- (iv) the recovery of "Khurpa" (Ext-1), used in commission of offence is shrouded in mystery;
- (v) absence of source of light at the spot;
- (vi) absence of motive for commission of offence but strong motive for false implication of appellant;
- (vii) the names of the other participants in the commission of offence not traced out by the Investigating Agency ; and
- (viii) no independent witness or witnesses present at the crusher examined.

11. We have carefully examined the evidence adduced on record.

12. Narendra (P.W. 1) testified that he along with his cousin brother Mahendra had gone to attend the date in the court and after attending the court at Saharanpur they proceeded at about 4 P.M. to their village. They boarded the bus from village Onali and got down near the crusher of Ajay Pal where they met the accused Mahendra and his companions. Accused Mahendra had a "Khurpa" used for preparing "Jaggery", in his hand. The accused Mahendra and his companions started assaulting his brother who ran away towards the crusher and fell down. Accused Mahendra and his companions continued to assault him. There was electric light and gaslight at the crusher. According to him out of fear he fled away from the spot and reached Ambchata police outpost and lodged the written report Ext. Ka-1.

13. The first and foremost question for consideration is whether First Information Report was the outcome of deliberations and consultations. The incident took place on 3.1.2000 at about 9 P.M. near the crusher of Ajay Pal situated in village Chaparchidi towards the eastern side of Saharanpur Ambehata Road. The First Information Report was lodged at police outpost Ambehata P.S. Nakud district Saharanpur on 4.1.2000 at 12.40 A.M. The intervening distance between the place of offence and police outpost Ambehata according to the Investigating Officer Alok Prabhakar Awasthi (P.W.5) was one Km. Obviously there was a delay of more than 3/1/2 hours in making the First Information Report. The testimony of witness Narendra P.W.I is that he ran away from the spot and reached Ambehata police outpost and narrated the incident to station officer who asked

him to give report in writing. He went outside the police station and scribed the written report. He gave out that he reached the police outpost hiding himself and it took 3- 3.30 hrs. time to reach there. The entry at serial No. 2 dated 4.1.2000 at 00.40 A.M. Ext. Ka-9 made in the general diary maintained at police outpost Ambehata in relation to registration of crime reveals that first informant Narendra accompanied by Kunwar Pal son of Antram and Virendra Singh son of Prem Singh R/o village Chaparchidi came to the police outpost and lodged the written report about the murder of his cousin brother Mahendra. The G.D. entry Ext. Ka-9 belies the testimony of first informant Narendra (P.W.I) with regard to the fact that he went alone to the police outpost directly from the place of offence. The first informant having not gone to the police station alone, the explanation given by him for the delay of more than three and half hours in making the First Information Report is not cogent and convincing. Moreover, his testimony that out of fear he went to the police outpost hiding himself which took considerable time does not appeal to reason as his brother and uncle accompanied him to the police outpost. Looking to the intervening distance of 1 KM., between the place of offence and police outpost the delay of about 3/1/2 hrs. in making the First Information Report indicates that it lacks spontaneity.

14. The eye witnesses Bijendra (P.W.2) and Sethpal (P.W.3) having denied their presence at the spot at the time of commission of offence, there remains the solitary evidence of Narendra (P.W.I) cousin brother of the deceased. His testimony has been assailed on the ground that there are material contradictions and inherent drawbacks going to its very root. The witness Narendra (P.W.I) stated to have accompanied his cousin brother Mahendra (deceased) to attend a case at Saharanpur court and both of them left the court at about 4 P.M. and reached village Onali from where they boarded a bus for going to their village and alighted from the bus near the crusher of Ajay Pal. in his cross examination the witness gave out that he came to Saharanpur court along with deceased to attend a case under Sections 323 504 I.P.C., which was pending in the court of A.D.M. The witness could not disclose the number of case, names of the maker of First Information Report and witnesses. According to him one or two criminal cases under Sections 323 504 I.P.C. were pending against the deceased. His testimony reveals that the deceased was not the maker of First Information Report or witness in the criminal case. The learned trial court has believed his testimony on the score that the witness and deceased might have gone to the seat of Assistant Prosecution Officer whose office is located there to enquire about the witnesses. A criminal case under Sections 323 504 506 I.P.C. is triable by the Judicial Magistrate not by the Additional District Magistrate. The deceased not being the maker of First Information Report and witness in the case, he must be an accused and in that case the deceased and witness Narendra (P.W.I) were not required to contact Assistant prosecution Officer. Their normal conduct would have been to contact the defence counsel in this chamber or at his seat or to wait for him in the court or to bring him to conduct the case at the call of court. According to the witness Narendra (P.W.I) his village Chaparchidi is situated at a

distance of about 25 Km. from Saharanpur. The deceased and witness Narendra left the court at Saharanpur at about 4 P.M. and reached near the crusher of Ajay Pal by bus at about 9 P.M. In the normal course they would not have taken five hrs. time in covering the distance of about 25 Km., more particularly by travelling in a bus.

15. According to the eye witness Narendra (P.W.I) the appellant subjected the victim to assault with "Khurpa" used for preparing "Jaggery". According to the recovery memo Ext. Ka-5 the dimensions of "Khurpa" (Ext. 1) recovered from the spot were length seven fingers (angul) on the upper side and width ten fingers (angul) with round wooden four hand span handle S.I. Alok Prabhakar Awasthi (P.W.-5) testified that blade of "Khurpa" Ext. 1 was 8 fingers (angul) in length four fingers (angul) in width and back side of blade of "Khurpa" was nine fingers (angul) and its frontage was four fingers (angul) and all the sides of "Khurpa" were 1/1/2 string thick. Looking to the dimensions of "Khurpa" (Ext.1) detailed in the recovery memo Ext.Ka-5 and evidence of Investigating Officer Alok Prabhakar Awasthy (P.W.5) the weapon of assault (Ext.1) does not appear to be sharp edged weapon. The role of mounting assault with "Khurpa" (Ext.1) was assigned to the appellant. The postmortem certificate (Ext. Ka-3) indicates the presence of multiple abraded contusions, one traumatic swelling and multiple abrasions injures 4,6,7,8 and 9 besides two incised wounds. The witness Narendra (P.W.I) has not stated that the deceased was attacked by the appellant from the blunt side of "Khurpa" (Ext.-I). There is no explanation as to how the deceased sustained abrasions and contusions. Moreover, the weapons carried by the unknown companions of appellant have not been mentioned in the First Information Report or disclosed in the testimony before the court. There is omission of mentioning of "Khurpa" in the column prescribed in the inquest memo for mentioning the articles and weapons recovered from the person of the deceased and lying nearby the dead body. The place from where recovery of "Khurpa" (Ext.1) made was separately indicated by the investigating office in the site plan. The omission of mentioning recovered "Khurpa" in the column prescribed in the inquest memo and difference in the dimensions of recovered "Khurpa" given in recovery memo Ext. Ka-5 and Khurpa (Ext.1) produced before the court and proved by the Investigating Officer make its recovery doubtful.

16. Coming to the question of presence of light at the spot there is omission of mentioning the source of light in the First Information Report (Ext. Ka - 8), site plan(Ext.Ka-4) and statement of Narendra (P.W.I) u/s 161 Cr.P.C. The eyewitness Narendra for the first time introduced the source of light in his testimony before the court. There is no evidence that crushing work was going on at the crusher of Ajay Pal. The testimony of witnesses Bijendra (P.W.2) and Seth Pal (P.W.3) was that the crusher where dead body of Mahendra found was lying closed for the last 6 or 7 days. The site plan (Ext. Ka-4) does not indicate the presence of furnace, pans used for cooking sugarcane juice for Jaggery, unprepared Jaggery and persons preparing Jaggery at the crusher.

17. The witness Narendra (P.W.I) has not mentioned any motive which prompted the appellant to mount murderous assault on the deceased. In his previous statement u/s 161 Cr.P.C. he gave out that Mahendra (deceased) was bad man and was being prosecuted in several cases. He resiled from his previous statement in his testimony before the court. The Investigating Officer Alok Prabhakar Awasthi (P.W.5) testified that witness Narendra stated before him that Mahendra was his real cousin brother and was a bad man and they used to keep him under their control and number of cases were pending against him. The evidence of Ajab Singh (D.W.1) was that Brahma Pal son of elder uncle of accused Mahendra fought election of village Pradhan and Roop Ram nominated by the father of first informant Narendra had contested election against him. According to him accused Mahendra has been falsely implicated due to the enmity of election of Pradhan. The deceased being a man of criminal antecedents, the possibility of his having been killed by unknown assailants cannot be ruled out.

18. The evidence of sole eye witness has to be examined with caution and circumspection and has to be accepted after testing it on the touchstone of probabilities and the evidence adduced by other witnesses. We are conscious of the fact that a finding of conviction can be recorded on the basis of solitary testimony of an eyewitness but such a course is permissible only if his evidence is cogent, reliable and in tune with probabilities and inspires confidence. Having tested the evidence of Narendra (P.W.I) on the anvil of probabilities we do not find it reliable and the finding of conviction recorded by the trial court on his sole testimony can not be sustained.

19. In that view of the matter, we allow the appeal and set aside the order of conviction and sentence dated 9.8.2005 passed by the Additional Sessions Judge, court No. 1 Saharanpur in Sessions Trial No. 297 of 2000. The appellant is in jail. He shall be released forthwith.

20. Certify the judgement to the lower court within a week. The original record of the case be also transmitted to the court below immediately. The compliance shall be reported by the Chief Judicial Magistrate Saharanpur within four weeks from the date of receiving the copy of this order.