
(2005) 09 AHC CK 0237
In the Allahabad High Court
Case No : Criminal Appeal No. 634 of 1989

Munna Singh, Karan Singh and Kushal Pal Singh	APPELLANT
Vs	
State of U.P.	RESPONDENT

Date of Decision : 08-09-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 311, 313
Evidence Act, 1872 — Section 32(1)
Penal Code, 1860 (IPC) — Section 302, 304, 307, 34, 43

Citation : (2005) 3 ACR 3091

Hon'ble Judges : Imtiyaz Murtaza, J; G.P. Srivastava, J

Bench : Division Bench

Advocate : M.P. Rai and R. Pandey, for the Appellant; M.S. Yadav, A.G.A. and A.G.A., for the Respondent

Judgement

G.P. Srivastava, J.—This is appeal against the judgment and sentence dated 4.3.1989 passed by the learned IV Addl. Sessions Judge, Kanpur Dehat in Session Trial No. 166 of 1985 State v. Munna Singh and two Ors. convicting the appellants u/s 302 read with Section 34 I.P.C. and sentencing them to life imprisonment.

2. According to the prosecution case the deceased Raju was resident of village Chilli police station Ghatampur district Kanpur Dehat. His family members had inimical terms with the accused Karan Singh and his family. On 4.5.1985 the deceased Raju was coming to his house from his field. When he reached at the door of one Ram Pal at about 7.00 P.M. the accused Karan Singh empty handed, accused Kushal Pal Singh armed with licensed gun and accused Munna Singh armed with country made pistol met him. They enquired from the deceased regarding whereabouts of his brother Sooraju. The deceased pleaded his ignorance. At this all these accused persons abused and began to hit him by foot and kicks. An alarm being raised by the deceased, Mangali, Mahabir, Ram Kumar and so many residents of the village reached there. The accused Karan Singh exhorted to kill the deceased and the accused Munna Singh with intention to

commit the murder of the deceased fired upon him by country made pistol which hit his stomach. A written report Ext. C-1 was scribed by Ramesh C.W. 3. It was submitted by the deceased injured at police station Ghatampur at 21.00 P.M. on 4.5.1985. A chick F.I.R. was prepared u/s 307 I.P.C. On the basis of the written report a case was registered vide G.D. No. 18 Ext. C-2. The injured Raju was sent to P.H.C. Bhitargaon for his medical examination. His injuries were examined on 5.5.1985 at 8.30 A.M. S.I. Desh Raj Singh, Investigating Officer recorded the statement of injured Raju which is Ext. C-6. The injured was later on admitted in U.M.H. hospital where he succumbed to his injuries at 1.45 P.M. on 6.5.1985. The dead body of the deceased was sent for post mortem. The post mortem was conducted on 7.5.1985 at about 1.30 P.M. The post mortem report is Ext. C-4. According to the opinion of the Doctor the death has taken place due to shock and haemorrhage as a result of fire arm injury. After usual investigation the Investigating Officer submitted the charge sheet against the accused appellants u/s 304 I.P.C.

3. The accused appellants were charged by the learned Addl. Sessions Judge in an offence u/s 302/43 I.P.C. The accused persons pleaded not guilty and claimed trail.

4. The prosecution examined P.W.I Sooraju, P.W. 2 Ram Sewak, P.W. 3 Pradeep Kumar Chaturvedi, P.W. 4 Desh Raj Singh, P.W. 5 Jhabboo, P.W. 6 Dr. R.N. Singh. C.W.I Indrapal Singh, C.W.2 Dr. K. K. Singh, C.W.3 Ramesh C.W.4 Desh Raj Singh, S.I. Investigating Officer and C.W.5 C.K. Shukla were examined by the Court u/s 311 Cr.P.C.

5. The accused persons in their statements u/s 313 Cr.P.C. have denied the prosecution case. The accused Kushal Pal Singh has stated that he was at police line Fatehpur at the time of occurrence. He has examined D.W.I H.C. Hari Mohan Shukla police line district Fatehpur.

6. The learned IV Addl. Sessions Judge had convicted the appellants and sentenced them as aforesaid. Feeling aggrieved by the judgment and sentence referred above the appellants have come in appeal.

7. We have heard learned counsel for the parties and carefully gone through the entire evidence on record.

8. The factum of death of deceased Raju has not been disputed. The post mortem report Ext. C-4 shows that the deceased received the following ante mortem injuries:-

1. Contusion of on rt-knee joint with infected one small wound 2 x 1.2 cms of rt knee joint ant aspect.

2. Swelling on upper lids of both eye Lids. No mark of Inj. on eye lids.

3. Gun shot wound of Entry 2 x 1.2 cms spindle shaped on right side abdomen in right iliac fossa 2.5 cms above pubic supraphysis on right side margins are

inverted. No mark of burning or tatting. Direction of fire-Right to left.

9. The doctor opined that the death was caused due to shock and haemorrhage as a result of fire arm injuries.

10. It is significant to note that the injuries of the deceased were initially examined at P.H.C. Bhitargaon on 5.5.1985 at about 8.30 A.M. and the injuries were found half day to one day old which corresponds to the prosecution story. Therefore, there is sufficient material to hold that the deceased died due to gun shot injuries sustained by him on 4.5.1985 at about 7.00 P.M.

11. In order to prove its case the prosecution examined 3 witnesses of facts i.e. P.W.1 Soorju, P.W. 2 Ram Sewak and P.W. 5 Jhabboo. It is significant to note that P.W.1 Soorju and P.W.2 Ram Sewak are the real brothers of the deceased whereas P.W.5. Jhabboo is the real uncle of the deceased. It is significant to note that none of the witnesses have been named in the F.I.R. P.W.I Soorju has claimed to be as an eye witness and claimed that he accompanied the deceased to police station but the G.D. entry and the statement of constable 509 Indra Pal Singh who has scribed the chick F.I.R. do not corroborate. Moreover the F.I.R. shows that the accused persons were enquiring about Soorju as he was the main target. Had he been there he must not have been allowed to escape. Similarly the witness P.W.2 Ram Sewak had also claimed himself as an eye witness of the occurrence but he had deposed against the prosecution story as set up in the F.I.R. His name does not find place in the F.I.R. nor he accompanied the injured to police station. P.W.5 Jhabboo the uncle of the deceased is a chance witness. He did not say who has actually fired upon the deceased. It appears that he did not see the occurrence as his name is also missing from the F.I.R. In this way it is proved that these witnesses were not present nor witnessed the occurrence and the learned Sessions Judge had rightly discarded their evidence.

12. The written report Ext. C-I was presented by the injured Raju. It was scribed by Ramesh (C.W.3). C.W.3 Ramesh was cross-examined before the court. He has stated that he scribed the report at the dictation of Raju and after scribing the report he read over to Raju. Thereafter Raju affixed his thumb impression before him and he has also signed the report. He has proved the report Ext. C-5. His examination-in-chief was recorded on 16.11 1988. On the said date opportunity of cross-examination was given to the accused persons but they refused to cross-examine. It is on 23.2.1989 after a lapse of 3 1/2 months the witness was cross-examined and in cross-examination he resiled from his earlier statement but had admitted that he had deposed correctly in his examination-in-chief. No summon was issued to him. He had admitted that the accused Kushal Pal Singh who is a police constable brought him to the court. The circumstance under which this witness had resiled from earlier statement in cross-examination shows that his examination-in-chief was the correct version and due to pressure of police constable who is an accused in this case he tried to resile from his statement. We therefore, discard the cross-examination of this witness and hold that the examination-in-chief of this witness is worth reliance and it is proved that the

written report has been scribed by him at the dictation of the deceased.

13. The statement of the deceased was recorded by the Investigating Officer, S.I. Desh Raj Singh u/s 161 Cr.P.C. on the same day i.e. on 4.5.1985. Investigating Officer, S.I. Desh Raj Singh C.W.4 in his statement has stated that Raju was not unconscious. He was in full conscious at the time of recording of his statement. He has further stated that he recorded the statement of Raju in presence of Ramesh and Putti Lal but neither he obtained the signature of Raju nor of the witnesses nor he endorsed that the statement was recorded in presence of the witnesses. In fact these are not the infirmities. The Investigating Officer was recording the statement of the complainant Raju u/s 161 Cr.P.C. and not his dying declaration. So if these precautions have not been taken by him it does not show that the statement of Raju was not genuine. P.W. 6 Dr. R.N. Singh who has examined the injuries of injured Raju has been examined. In his statement he stated that it may be possible that the injured could be unconscious by the injuries sustained but he was not suggested by the defence that the injured was unconscious when his injuries were examined. Had he been unconscious the fact must have been mentioned in the injury report. Therefore it cannot be held that the injured was unconscious when his statement was recorded by the Investigating Officer.

14. The learned counsel for the appellants has argued that the Investigating Officer Desh Raj Singh C.W.4 has stated that he recorded the statement of injured Raju at about 7.00 or 7.15 P.M. the F.I.R. was lodged at 9.00 P.M. So it is not possible to record the statement of the injured at 7.00 P.M. This factum has not been put to the witness when he was in the witness box. Had it been put to him in cross- examination he could have explained the circumstance under which he deposed that the statement was recorded at 7.00 P.M. Now it is not open for the appellant to argue that on this point the statement of the injured should be discarded.

15. Section 32 Sub-section 1 of Indian Evidence Act reads as below:

"32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.- Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:-

(1) When it relates to cause of death:- When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be nature of the proceeding in which the cause of his death comes

into question."

16. It has been held in Munnu Raja and Another Vs. The State of Madhya Pradesh, " Where after making the statement before the police, the victim succumbs to his injuries the statement can be treated as a dying declaration and is admissible u/s 32(1) of the Act."

17. It has further been held in Raja Ram v. The State of U.P. 1978 A L.J. 51 that the F.I.R. could be treated as an oral dying declaration of the deceased because it was on his information about the incident.

18. Thus the written report Ext. C-1 proved by the scribe Ramesh C.W.3 and the statement of deceased complainant (Ext.C-6) recorded by the Investigating Officer S.I. Desh Raj Singh C.W.4 come within the definition of dying declaration and as such are admissible in evidence. It has been held in Munnu Raja Case (Supra) that the dying declaration recorded u/s 32(1) can be acted upon without corroboration. Therefore the written report Ext. C-1 and the statement of the deceased recorded u/s 161 Cr.P.C. by the Investigating Officer (Ext. C-5) are sufficient to prove the prosecution case.

19. The accused Kushal Pal Singh in his statement u/s 313 Cr.P.C. has stated that he was at Fatehpur police line. This can be taken to as half hearted alibi. In this connection the accused has examined D.W.I H.C. Hari Mohan Shukla police line district Fatehpur who brought the G.D. No. 32 dated 4.5.1985 of police line Fatehpur and filed its extract Ext. Kha-1. The cross-examination reveals that this document could not be proved as the witness failed to say who was the writer of the G.D. Beside that it has come in his evidence that accused Kushal Pal Singh was posted at Police Office Fatehpur on the relevant date and neither his arrival nor his departure was recorded in the G.D. The Investigating Officer, Desh Raj Singh C.W.4 has stated that the place of occurrence is 62 - 65 Kms. From Fatehpur and by a fast moving vehicle one can reach Fatehpur from the place of occurrence within an hour. Therefore, we are of the view that the learned Addl. Sessions Judge has rightly disbelieved the alibi of accused Kushal Pal Singh.

20. As regards the role of the accused persons are concerned there is specific description in the written report Ext. C-1 as well as in the statement of the deceased Ext. C-6. It has been alleged therein that the accused Kushal Pal Singh armed with a licensed gun, accused Munna Singh armed with country made pistol and accused Karan Singh empty handed reached there. Accused Karan Singh exhorted to kill the deceased and the accused Munna Singh fired upon him by his country made pistol. The accused Kushal Pal Singh was found present there but no over has been attributed to him. The common intention to kill the deceased cannot be attributed to him because despite the fact that he was armed with a licensed gun, He did not open fire. It has been alleged that all the accused persons abused and beaten the deceased by foot and feast but neither any charge has been framed in respect of the aforesaid offence nor there is any medical evidence to this effect. Therefore the case of the accused Kushal Pal

Singh is distinguishable from the rest of the accused persons. We are of the view that the prosecution has not been able to prove its case beyond reasonable doubt against the accused Kushal Pal Singh and he deserves to be acquitted from the offences charged. We are agree with the findings of the learned Addl. Sessions Judge as far as the accused Karan Singh and Munna Singh are concerned and hold that the prosecution has been able to prove its case beyond reasonable doubt against the accused Karan Singh and Munna Singh in offence u/s 302 read with 34 I.P.C. There is no justification to interfere in the judgment and sentence passed by the learned Addl. Sessions Judge in respect of the above two accused persons.

21. In the result the appeal against the conviction and sentence passed against the appellant Kushal Pal Singh is allowed. He is acquitted from the offences charged. The conviction and sentence of appellant Kushal Pal Singh is set aside. He is on bail. He need not surrender. His bail bonds are cancelled and sureties are discharged.

22. The appeal against the conviction and sentence of appellants Munna Singh and Karan Singh is dismissed. They are on bail. They are directed to surrender forthwith to serve out the sentences already awarded to them.

23. The Chief Judicial Magistrate, Kanpur Dehat is directed to take them into custody and send them to jail for the above sentence and send his compliance report to this Court in a month.