
(2017) 04 AHC CK 0174
In the Allahabad High Court
Case No : 6701 of 2004

Pappu

APPELLANT

Vs

State Of U.P.

RESPONDENT

Date of Decision : 19-04-2017

Acts Referred:

Code of Criminal Procedure, 1973, Section 161, Section 313 - Examination of witnesses by police - Power to examine the accused
Indian Penal Code, 1860, Section 302, Section 34, Section 307 - Punishment for murder - Acts done by several persons in furtherance of common intention - Attempt to murder

Citation : (2017) 04 AHC CK 0174

Hon'ble Judges : Bharat Bhushan, Shailendra Kumar Agrawal

Bench : Division Bench

Advocate : Onkar Singh, Noor Mohammad, S.K. Shukla

Judgement

1. This criminal appeal has been preferred against the judgment and order dated 02.12.2004, passed by Sessions Judge, Baghpat, in Session Trial No. 172/2004 (State Vs. Pappu) under Section 302 I.P.C. PS- Baghpat, District- Baghpat, by which the appellant Pappu was convicted and sentenced for life imprisonment under Section 302 I.P.C. Appellant was however, acquitted under Section 307 I.P.C. by the same judgment.

2. Brief facts of the case are that the informant Vijay Pal, father of deceased Aman, got report Ex. Ka1 scribed by one Jagdhir Singh alleging that he used to manufacture jaggery on kolhu. Payment of jaggery was overdue to Pappu and Shaukeen, accused persons in this case. His son Aman used to demand such amount from accused persons, due to which they developed grudge with him. On 13.7.2000 at about 10:30 a.m. his younger son Gopal and his brother Ram Das were standing in-front of tube well room and his deceased son Aman went into that room to fetch spade. Suddenly accused persons armed with country made

pistols intimidated Aman saying "VERNACULAR MATTER OMITTED", Appellant Pappu then shot Aman and appellant Shaukeen also fired with the intention to murder his son Gopal and his brother Ram Das but they escaped narrowly. On the cry of his son and brother, accused persons ran away waving country made pistol. Many villagers also gathered there. They took injured Aman to the Government Hospital, Baghpat and then to Safdarjung Hospital, Delhi, but Aman died on the way. The dead body of Aman was brought in a maruti van to police station. On this written report Ex. Ka1, a Chik F.I.R. Ex. Ka11 was prepared in crime no. 429/2000, under Section 307, 302 I.P.C., at 2:00 p.m. at PS- Baghpat, District- Baghpat, and G.D. no.37 Ex. Ka12 dated 13.7.2000 was prepared accordingly.

3. Investigation was entrusted to S.I. Suresh Chandra Gangwar(P.W.5). He prepared inquest report Ex. Ka3 and also prepared other documents like letter to C.M.O. Ex. Ka4, Challan Nash Ex. Ka5 and Photo Nash Ex. Ka6. Investigating Officer also prepared a site plan Ex. Ka7. He also took samples blood stained and simple earth from the spot and prepared a fard Ex. Ka8 in presence of witnesses Jawahar Singh and Jitendra. On 15.7.2000 the accused Shaukeen was arrested with country made pistol. Police also recovered a country made pistol (12 Bore) at the instance of accused Pappu and prepared a fard and site plan Ex. Ka10 regarding recovery of that pistol. Investigation culminated into filing of the charge-sheet Ex. Ka9 under Section 307/302 I.P.C.

4. On 14.7.2000 post mortem was conducted by Dr. D.R. Agrawal Medical Officer Kairana, District- Muzaffarnagar and he found following ante mortem injuries on the person of deceased:- "Gun shot wound entry size 8cm x 4cm right side and middle of forehead and skull about touches the gradial end of right eyebrow. Brain matter is lacerated and outside. He also found 10 pellets in the skull and on internal examination he found almost all the bones of the skull and all the membranes fractured and the brain was tattered. Doctor opined that these injuries were sufficient to cause death due to heavy bleeding and shock. Dr. Agrawal proved the postmortem report Ex. Ka2."

5. The co-accused Shaukeen had absconded due to which he could not be tried by the lower Court and his case was separated by Chief Judicial Magistrate Baghpat, vide order dated 7.4.2004. Only the case of Pappu was committed to the Sessions Court. The learned Sessions Judge Baghpat, framed the charge against Pappu under Section 302 and 307/34 I.P.C. Appellant Pappu was acquitted under Section 307 I.P.C. but held guilty under Section 302 I.P.C.

6. To substantiate the charge the prosecution has examined P.W.1 Vijay Pal s/o Shera, P.W.2 Gopal s/o Vijay Pal Singh, P.W.3 Ram Das s/o Shera, P.W.4 Dr. D.R. Agrawal, P.W.5 S.I. Suresh Chandra Gangwar and P.W.6 constable Surendra Kumar.

7. The statement of accused was recorded under Section 313 Cr.P.C. He denied all the allegations of prosecution and claimed falsely implication due to previous

enmity. Jaiveer Singh D.W.1 and Surendra D.W.2 were examined as defense witnesses.

8. We have heard the arguments of Shri I.K. Chaturvedi, Shri Sunil Kumar Dubey, learned counsel for appellant and Shri Ajit Ray, learned A.G.A. for State.

9. Learned counsel for appellant have argued that appellant had no motive and no grudge against Aman to murder him. He has been falsely implicated. They have further argued that witnesses were not in position to witness the occurrence. They are partisan witnesses and relative of deceased. They have further argued that no ballistic report regarding recovered country made pistol, by which Aman was allegedly shot dead, has been produced. No report regarding blood stained and simple earth has been filed. F.I.R. is ante-timed.

10. Learned A.G.A., by refuting all the contentions advanced on behalf of appellant, stated that there was clear-cut motive on the part of the accused to murder Aman. It is true that witnesses are relative but their testimonies are credible and supported with medical evidence. Furthermore, it is a case of direct evidence and F.I.R. has been promptly lodged.

11. Hon"ble Apex Court has laid down the guidelines for decision of criminal appeals, from time to time. The Hon"ble Apex Court has propounded the following principles in Padam Singh Vs. State of U.P. reported in 2000 (1) SCC 621 which is quoted here : "it is the duty of an appellate court to look into the evidence adduced in the case and arrive at an independent conclusion as to whether the said evidence can be relied upon or not and even if it can be relied upon, then whether the prosecution can be said to have been proved beyond reasonable doubt on the said evidence. The credibility of a witness has to be adjudged by the appellate court in drawing inference from proved and admitted facts. It must be remembered that the appellate court, like the trial court, has to be satisfied affirmatively that the prosecution case is substantially true and the guilt of the accused has been proved beyond all reasonable doubt as the presumption of innocence with which the accused starts, continues right through until he is held guilty by the final court of appeal and that presumption is neither strengthened by an acquittal nor weakened by a conviction in the trial court."

12. Further guidelines have been issued by the Hon"ble Apex Court in case of Rama & others Vs. State of Rajasthan reported in 2002 (4) SCC 571 which is as under: "It is well settled that in a criminal appeal, a duty is enjoined upon the appellate court to reappraise the evidence itself and it cannot proceed to dispose of the appeal upon appraisal of evidence by the trial court alone especially when the appeal has been already admitted and placed for final hearing. Upholding such a procedure would amount to negation of valuable right of appeal of an accused, which cannot be permitted under law."

13. The guidelines have been issued by three Judges Bench of the Hon"ble Apex Court in case of Majjal Vs. State of Haryana, 2013 (6) SCC 798 which is as under: "It was necessary for the High Court to consider whether the trial court's

assessment of the evidence and its opinion that the appellant must be convicted deserve to be confirmed. This exercise is necessary because the personal liberty of an accused is curtailed because of the conviction. The High Court must state its reasons why it is accepting the evidence on record. The High Court's concurrence with the trial court's view would be acceptable only if it is supported by reasons. In such appeals it is a court of first appeal. Reasons cannot be cryptic. By this, we do not mean that the High Court is expected to write an unduly long treatise. The judgment may be short but must reflect proper application of mind to vital evidence and important submissions which go to the root of the matter."

14. The aforesaid observations have been quoted by the Hon'ble Apex Court in the case of Kamlesh Prabhudas Tanna and Anr Vs. State of Gujarat reported in 2014 Cr.LJ 443.

15. Keeping in view the propositions cited above, the Court is to scrutinize the evidence available before it and to draw the inference accordingly, bearing in mind the presumption of innocence of accused unless otherwise is established from evidence available on record without being influenced by the findings recorded by learned trial court.

16. We have considered the rival submissions advanced by the learned counsel for the parties and perused the entire record.

17. P.W.1 Vijay Pal, his son P.W.2 Gopal Kumar and his brother P.W.3 Ram Das have proved the prosecution version. P.W.1 is not the witness of incident. He has stated that his son Aman was shot down at about 10:00-10:30 a.m. at his tube well. His son Gopal narrated him the whole incident. P.W.1 has further stated that he used to manufacture jaggery on Kolhu and there were some dues of jaggery against accused Pappu. Aman used to demand this money from accused and on this grudge Aman was murdered. On receiving the information of the incident, he went to the place of incident. At that time Aman was alive, first he brought Aman to Baghpat Hospital in a van, but doctors refused to admit him and advised to take him to Delhi Hospital, but Aman died on the way to Delhi, then he brought back his body to PS- Baghpat and got the report scribed by one Jagdish. P.W.1 has proved this written report Ex. Ka1. He has also stated that Panchayatnama of his son was prepared in police station and body was sent for postmortem.

18. P.W.2 and P.W.3, the eye witnesses, have supported the prosecution version in their examination in chief. All these witnesses have been cross-examined at length but nothing could be extracted in their cross-examination which may adversely affect the prosecution case. There is no material contradiction in the statements recorded under Section 161 Cr.P.C. and the ocular evidence in court and if there are no material discrepancies or contradictions in the testimony of a witness, his evidence cannot be disbelieved merely on the basis of some normal, natural or minor contradictions, inconsistencies, embellishments etc. and such minor discrepancies do not corrode the credibility of parties, [Bherulal Vs. State

of Rajasthan 2009 (66) ACC 997 (SC), Sucha Singh Vs. State of Punjab (2003) 7 SCC 647]. The testimony of P.W.1, P.W.2 and P.W.3 appear to be natural, direct, cogent, credible, reliable and inspire confidence.

19. It was argued on behalf of appellant that it was not possible for the witnesses P.W.2 and P.W.3 to witness the occurrence from such a distance as both witnesses were admittedly at the distance of 20-25 metres away from the place of incident. We do not agree with this argument as there were open fields all around and deceased and all present were working in their fields at the time of incident. Deceased Aman had gone to that tube well room. Suddenly accused persons came from the field of Mehraj. P.W.3 was watching their movement but did not apprehend anything. P.W.2 has stated that these accused persons were 20-25 metres away from him and he clearly witnessed the occurrence. Both witnesses have also stated that Aman was shot dead from the distance of 1-2 (ft). This fact is also consistent with medical evidence. Hence, argument of learned counsel for appellant has no force. P.W.3 has also stated that two shots were fired, one was made by Pappu on Aman and another shot was discharged by Shaukeen on him and Gopal. Both witnesses have clearly testified that Aman was shot in his forehead which is also supported by medical evidence.

20. It has also been argued on behalf of learned counsel for appellant that there was no motive to kill Aman. It is a clear-cut case of prosecution that appellant Pappu owed Rs. 3000/- to deceased Aman. Repeated demand of this money infuriated the appellant. Complainant believes that this was the motive for the murder of deceased. We have no reason to disagree the prosecution on this score. Testimonies of defense witnesses are shaky and not trustworthy. P.W.2 has been suggested that the accused Pappu did not do trade in jaggery, but witness has denied this suggestion and all the witnesses have specifically stated that Pappu did trading in jaggery. D.W.2 Surendra has admitted that deceased earlier used to manufacture jaggery but at the time of incident, his kolhu was closed. Thus, possibility of dues on accused cannot be ruled out. Furthermore, accused could not prove any animosity on the part of the witnesses. There is nothing adverse in this regard in their cross-examination.

21. In any case, it is the case of direct evidence, hence there was no need to prove the specific motive on the part of the accused to commit the crime. Motive is not a sine qua non for the commission of crime. Moreover, it takes a back seat in a case of direct evidence. In a case of direct evidence the elements of motive does not play such an important role so as to cause any doubt on the credibility of the prosecution witnesses. If the eye witnesses are trustworthy and reliable, the motive attributed for the commission of crime may not be of much importance and relevance. [State of U.P. Vs. Nawab Singh (2005) SCC criminal (33)].

22. P.W.1 has been suggested that Aman, Gopal and Ramdas were involved in the business of purchasing and selling illegal country made pistols. The witness has denied this suggestion. It has also been suggested to P.W.1 that on the day

of incident Aman came to Pappu to show the country made pistol and when Aman was showing this country made pistol by opening it, suddenly it fired itself and caused injury to Aman. But P.W.2 has been given different suggestion that Aman was seeing his country made pistol, suddenly it fired and caused injury but the same has also been denied and contrary to it P.W.3 has been suggested that Aman was not murdered at 10:30 a.m. rather he was murdered by some unknown miscreants who used to come to Aman. D.W.1 and D.W.2 have admitted in their examination in chief that Aman was murdered in-front of his tube well. Thus D.W.1 and D.W.2, have supported the prosecution version as far as place of occurrence and manner of incident caused by country made pistol are concerned. While different suggestions have been given to P.W.1, P.W.2 and P.W.3 which has weakened the case of defense.

23. Matter of cross-examination is not a mere empty formality, but one is required to put its own case in cross-examination otherwise a version of the witness has to be taken as unchallenged [Sirmal Vs. Annapurna Devi, AIR 2001 MP 1 0].

24. The matter has been considered in a number of decisions that it is the duty to put ones own version to opponent in crossexamination otherwise deposition of a witness cannot be discredited.

25. It was held in Maroti Bansi Teli Vs. Radhabai, AIR 1945 Nag 60 that:- "The usual practice at the bar is to accept matters which are not challenged either in the pleadings or in crossexamination as finally established once a person enters the box and swears to it. If the rule were otherwise, parties would be obliged to encumber the record with a mass of material which in the result might prove wholly unnecessary. The practice, therefore, is when it is intended to challenge-point which is not specifically challenged in the pleadings to cross-examine to it formally the first time it is raised in a witness's deposition. The other side is then placed upon its guard and is given notice that it must establish the point as fully as it can. When that is not done it means that the point is not challenged and can be accepted."

26. In Chunni Lal Dwarka Nath Vs. Hartford Fire Insurance Co. Ltd., AIR 1958 Punj 440 it has been held as under: "It is a well established rule of evidence that a party should put to each of his opponent's witnesses so much of his case as concerns that particular witness. If no such questions are put, the Courts presume that the witness's account has been accepted. If is it intended to suggest that a witness was not speaking the truth upon a particular point, his attention must first be directed to the fact by cross-examination so that he may have an opportunity of giving an explanation."

27. Though the suggestion made in the cross-examination is not evidence but certainly the same may be called into aid only to lend assurance to the prosecution case, particularly when other evidence establishes the guilt of the accused [(Rajesh Namdeo Vs. State of Maharashtra, 2002 (4)Mah LJ 267 (Bom)].

28. The question put in the cross-examination to a great extent probabilise the prosecution version. Though questions put in cross-examination are not always determinative in finding an accused guilty, but they are certainly relevant. [Jesu Asir Singh Vs. State, (2007) 12 SCC 19 (24) : AIR 2007 SC 2015].

29. The observations made by the Hon'ble Supreme Court while appreciating the evidence in the case of Rakesh Kumar alias Babli Vs. State of Haryana reported in 1987 CriLJ 535 are worth noting. The Apex Court in para 9 of the report held thus : "In his cross-examination, P.W. 4, Sube Singh, stated that the accused Dharam Vir, was wearing a shirt of white colour. It was suggested to him on behalf of the accused that Dharam Vir was wearing a shirt of cream colour. In answer to that suggestion, P.W. 4 said "It is not correct that Dharam Vir accused was wearing a shirt of cream colour and not a white colour at that time." The learned Sessions Judge has rightly observed that the above suggestion at least proves the presence of accused Dharam Vir, on the spot at the time of occurrence."

30. Where the whole story of the prosecution has been denied, but as the suggestions are also very important factor and it reflects the story and version of defense. Thus the suggestion made by the defense in the cross-examination lends assurance to the prosecution case.

31. In this way by giving the suggestion to P.W.1, P.W.2 and P.W.3 and by examining D.W.1 and D.W.2, accused himself is admitting his presence with the deceased at the time of incident and is also accepting the death of Aman caused by country made pistol, though done by someone else, but in that situation the statements of P.W.1, P.W.2 and P.W.3 cannot be disbelieved and his presence will be treated "as a fact admitted" to the accused and "admitted fact is need not to be proved" which is the basic principle of law of evidence.

32. It is noteworthy that no suggestion has been given to P.W.2 that he was not present on the spot at the time of occurrence, and it is also noteworthy that P.W.3 is real uncle of deceased and he has stated in his cross-examination that P.W.1 is his brother and there is only one "Chak" on one place of his brothers. He and Aman had gone to their field at 4:00 a.m. in the morning while Gopal had come there after taking their breakfast. All this shows the presence of P.W.2 and P.W.3 on the spot and their versions are not doubtful and there is no contradiction in their statement.

33. As far as questions of partisan and relative witnesses are concerned, these witnesses have been put to lengthy crossexamination. If the testimony of eye witnesses is not found doubtful, it cannot be discarded merely because they are relative of deceased. There is nothing on record which may have oblique impact on the veracity of their statement recorded in court. It is noteworthy that D.W.1 and D.W.2 themselves are supporting the prosecution version as they reached on the same spot by hearing the sound of fire. The field of D.W.2 is just near to this tube well and shop of D.W.1 is near to the place of incident. The place of incident

has not been challenged by the appellant. Hence, in those circumstances this court is fully in agreement with the view taken by the learned trial court that witnesses are reliable, their testimony cannot be discarded as has been held in Kuria and Another Vs. State of Rajasthan (2012) 10 SCC pg. 433. Hon"ble Supreme Court has laid down that in such situation court must place its judgment on the statement of such witnesses.

34. As per prosecution case this incident took place at about 10:30 a.m. P.W.2 and P.W.3 have clearly supported it. However, D.W.1 has stated that this incident took place before 7:00 a.m. while D.W.2 has stated that this incident took place before 6:30 a.m. Thus, the defense witnesses themselves are confused on the point of time of incident. D.W.1 is a shopkeeper. He used to open his shop at about 5-5:30 a.m. in summer and if this incident took place at 7:00 a.m. Question arises that why he went on the spot and moreover he was not friend or relative of deceased. His presence seems to be doubtful. Both D.W.1 and D.W.2 have admitted that body of Aman remained on the spot till 10 a.m. The question arises why would body of Aman lie there up to 10:00 a.m.?, if the incident had taken place at 6:30 or 7:00 a.m. D.W.1 and D.W.2 have stated that when they reached on the spot, they saw that Aman was dead but they did not say anything to family members of Aman that why were they taking Aman to hospital when already dead?

35. All the prosecution witnesses P.W.1, P.W.2 and P.W.3, found Aman alive there. They took Aman first to District Hospital Baghpat and then to Delhi by a van. D.W.1 and D.W.2 have also admitted that Aman was taken in a van belonging to Nirozpur village. P.W.5 Investigating Officer has also admitted in his examination in chief that the case was registered on same day in his presence in police station at 4:10 p.m. and the body was lying in a van. It is evident that when complainant was carrying his son to Baghpat Hospital and from Baghpat Hospital to Delhi, Aman was alive and in that situation, it cannot be said that incident took place at 6:30 a.m. or 7:00 a.m. because otherwise there was no reason for complainant to stay at the spot till 10:00 a.m.

36. It has been argued on behalf of the appellant that it is mentioned in the inquest report that there was a bandage on the head of the deceased. This shows that from the place of occurrence, deceased was taken to Hospital and then to Delhi while prosecution case is different. It shows that F.I.R. was antetimed. We are of the opinion that when Aman was taken to the Baghpat Hospital, he was immediately referred for treatment to Delhi due to serious condition. The possibility cannot be ruled out that as on the spot head of Aman was covered with a bedsheet to stop the bleeding. In the similar manner doctor of District Hospital Baghpat might have bandaged it for stopping the bleeding. Moreover, it was necessity on the part of the defense to put questions and to seek explanation from prosecution witnesses in this regard but of no avail. We believe that this has not adversely affected the prosecution case.

37. P.W.1 has also stated in his cross-examination that the case was registered

at police station Baghpat by 4:00 p.m. after returning from Safdarjung Hospital Delhi. P.W.6 Head Moharrir has also stated that on the written report given by the complainant, he had registered the case by 4:10 p.m. P.W.5 has also stated in his cross-examination that he started his investigation on 13.7.2000 after 4:10 p.m. Thus it cannot be said that F.I.R. was ante-timed in anyway or there was any delay on the part of complainant in lodging F.I.R. because as soon as he returned from Delhi from the gate of Safdarjung Hospital where, before admitting Aman in the hospital, he was told on the gate that his son had died, he came back and lodged the F.I.R. This fact is also corroborated with the fact that the body of Aman was lying in the van which was standing in-front of police station Baghpat.

38. It has been argued that in F.I.R. the complainant Vijaypal has written that at the time of incident, Aman went to closet to take spade and he has also stated this fact in his statement in court while P.W.2 and P.W.3, the witnesses of fact, have stated that at the time of incident Aman went there to put spade in the closet. Thus, witnesses are giving contradictory statements. Both D.W.1 and D.W.2 themselves are admitting that this incident took place in-front of closet. P.W.1 got the F.I.R. scribed as was stated by his son Gopal. This witness is illiterate and used thumb impression. The body of his son was lying in van when he was getting F.I.R. scribed by someone. In that situation the court can easily presume the mental condition of the complainant. Hence, this would be treated only as a minor contradiction and it does not affect the core of prosecution case. It would be immaterial whether Aman went to that closet for taking the spade or to put the spade.

39. As regards the question, that Investigating Officer had not sent the recovered country made pistol to ballistic experts or Investigating Officer did not send the blood stained or simple earth to chemical examiner is concerned, it is correct that Investigation Officer was negligent and careless in this regard in discharging his duty but Hon"ble Supreme Court has laid down that a defective investigation per se may not be fatal to prosecution where ocular testimony is found credible and cogent. [State of Punjab Vs. Hakam Singh (2005) 7SCC 408] and [Dhanaj Singh Vs. State of Punjab (2004) 3 SCC 654].

40. Thus, on the basis of aforesaid discussion we are of the considered view that prosecution has proved its case beyond all reasonable doubt.

41. After critical appraisal of the prosecution case and the evidence available on record we are of the considered opinion that the learned Court below has committed, no illegality or irregularity in recording the findings of conviction against the accused appellant Pappu and the findings recorded by the lower court below are reasoned one. As such there appears no justification for interference by this court in the impugned judgment and order.

42. In view of the aforesaid discussions, judgment and order dated 02.12.2004 passed by the court below convicting and sentencing the accused/ appellant

Pappu is hereby affirmed. Accordingly, this appeal is dismissed.

43. Accused appellant Pappu, who is in jail be informed accordingly to serve out the remaining sentence awarded by the learned trial Court.

44. Let the lower court's record be sent to the court concerned forthwith along with a copy of this judgment and order for necessary compliance. Concerned court shall report compliance within one month thereafter.