

(2008) 02 AHC CK 0229
In the Allahabad High Court

Sri Krishna alias Tijura Yadav and Sri Raghubir Singh Yadav	APPELLANT
Vs	
State	RESPONDENT

Date of Decision : 04-02-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 107, 117, 313
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2008) 02 AHC CK 0229

Hon'ble Judges : V.K. Verma, J;S.S. Kulshrestha, J

Bench : Division Bench

Final Decision : Partly Allowed

Judgement

S.S. Kulshrestha and V.K. Verma, JJ.—This appeal has been brought against the judgement and order dated 27th February 1982 passed by the learned Sessions Judge, Hamirpur in ST. No. 101 of 1981 (State v. Shri Krishan alias Tijuwa and Anr.) whereby convicting both the accused appellants for the offence under Sections 302/34 IPC and sentencing them for life imprisonment. It is said that the learned trial court has not appreciated properly the materials and evidence on record. The FIR version does not find corroboration from the medical report. It appears that somebody else had inflicted injuries to the deceased but because of the past enmity and the dispute with regard to the agricultural property, they have falsely been roped into this case. The accused appellants were also related to the complainant and to put them into inconvenience and harassment they have been fastened into this case.

2. At this stage it may be mentioned that Sri Raghubir, one of the accused appellants, had died during the pendency of this appeal, the appeal as against him already stood abated vide order dated 3rd July 2007. The appeal of Sri Shri Krishan alias Tijuwa survives only. In order to facilitate the disposal of this appeal, a brief resume" of the facts may be made out. As would appear from the written report, exhibit Ka-2, registered at Police Station Jalalpur, district Hamirpur, the incident is said to have taken place on 25th December 1980 at

about 11 a.m. and its report was lodged on the same day at about 2.45 p.m. whereas the place of incident was referred to be about 16 kms from the aforesaid Police Station. The report was lodged by complainant Sri Brindawan, P.W.-1 with the allegations that it was about 10.00 a.m. when he along with his nephew Sri Ram Dhan was going to fields (Har) from their house and when they reached in front of the house of Sri Mohan Singh Yadav, they noticed accused appellants Sri Shri Krishan alias Tejuwa, s/o Sri Badri Yadav and Sri Raghbir Singh s/o Sri Durg Singh Yadav armed with phawra and axe respectively and they started giving blows with their weapons. Alarm was raised by the complainant himself and Sri Mohan Singh, which attracted other witness namely Sri Dharm Pal. It has also been reported that there was enmity in between the accused appellants and the deceased on the point of division of the agricultural holding. That enmity turned to be grave when Sri Ram Dhan had cultivated the portion of the disputed land. The victim was lying at the place of occurrence in the state of unconsciousness and its report was lodged at the Police Station. On the basis of the written report, FIR exhibit Ka-2, was registered at the Police Station and on that very date, the statement of the complainant Sri Brindawan was recorded by the Head Moharrir.

3. Thereafter the Investigating Officer Sri Narain Singh Rana reached at the place of occurrence at about 9.00 p.m. where the deceased was found lying on the cot and after making arrangements the inquest report was drawn by him at the place of occurrence in the presence of the witnesses namely S/Sri Mohan Singh, Dharm Pal and Shiv Ratan alias Deewan. He further proceeded to record the statement of Sri Shanker and Smt. Gulab Rani, the parents of the deceased. After preparing the inquest report, exhibit Ka-6 and drawing necessary documents, Exhibit Ka-7 to Exhibit Ka-9, the dead body was sent for post mortem through Constable 540, Sri Mahendra Kumar and Home Guard Sri Umar Singh to District Hospital. The Investigating Officer had further taken the samples of blood stained earth and simple earth from the spot and its fard, Exhibit Ka-11 was also prepared. After preparing the site plan, exhibit Ka-12 and recording the statements of the witnesses, charge sheet was submitted against the accused appellants.

Prosecution examined Sri Brindawan, who is the complainant of this case, as P.W.-1, Sri Mohan Singh as P.W.-2 and Sri Dharm Pal as P.W.-3 who are the eye-witnesses of this incident and other formal witnesses namely Sri Ambika Prasad, who was the Head Moharrir at the relevant place and had written the FIR, exhibit Ka-2 at the Police Station on the basis of the written report. P.W.-5 Dr. B.P Agarwal had conducted the autopsy on the dead body of the deceased on 27th December 1980 at about 12.15 p.m. and found following ante mortem injuries to have sustained by the deceased;

1. Incised wound 6 cm x 1 cm x bone deep on right side face 1 cm below to the right lower lid, vertical in direction, right maxilla cut.
2. Incised wound 8 cm x 2.5 cm x bone deep on right side face, just below the

lobule of right arm, horizontal in direction, right side mandible cut.

3. A lacerated wound 4 cm x 1 cm x scalp on right side of head 5 cm above the right eye brow horizontal in direction.

4. Incised wound 3 cm x 1 cm x muscle deep on posterior aspect, back of neck near the midline 2.5 cm above 7th cervical vertebrae, horizontal in direction.

5. The incised wound (1) 3 cm x .5 cm x muscle deep and (2) 3 cm x .5 cm x muscle deep in middle of back 3 cm below injury No. 4 horizontal in direction.

6. Multiple abrasion in an area of 6 cm x 4 cm on back of left shoulder.

7. A incised wound 4 cm x 1.5 cm x muscle deep on outer aspect of right arm 9 cm below right acromion process, horizontal in direction.

It was opined by the doctor that the deceased died because of shock and haemorrhage, as a result of ante mortem injuries. Further it was also opined by him that the death of the deceased might have taken place about two days before and that would also said to be the time of the incident as has been mentioned in the FIR.

4. P.W.-6, Sri Narain Singh Rana, the Investigating Officer has proved the FIR, exhibit -Ka-2 and other documents, the reference of which finds place in his statement. He stated that statements of some of the eye witnesses was recorded by him on 25th December 1980. Apart from examining the formal witnesses and producing the documentary evidence, the prosecution examined eye-witness P.W.-1, Brindawan, who was accompanying the deceased at the time of the incident, who stated that the accused persons are his Khandaani and they were harbouring ill will with the deceased because of the division of the agricultural land. On the basis of that ill-will they were after the blood of the deceased. It was on 25th December 1980 at about 11.00 a.m. he along with Sri Ram Dhan (deceased) was going to his field and when they both reached near to the house of Sri Mohan Singh, the accused appellant Sri Shri Krishan alias Tejuwa, who was armed with phawra and the other accused appellant Sri Raghubir armed with axe started giving blows to the deceased Sri Ram Dhan, who fell down on the ground. He and the deceased made alarm, which attracted some of the villagers. The injured was about to be taken to the hospital on a bullock cart but the moment he was put on the bullock cart, he succumbed to his injuries.

5. Thereafter he was shifted from the " bullock cart to the cot. The report of the incident was got scribed by Sri Mohan Singh and report, exhibit Ka-2 was lodged by him at the Police Station, Jalalpur at 2.45 p.m. on that very day. The motive of eliminating the deceased has also been clearly stated by the witness saying that the accused was hostile with the deceased on account of the dispute of the agricultural land. The testimony of this witness, who was at length cross-examined, remained intact. The hostility between the accused and the deceased was reflected through out in the statement of the witness. It is the specific case of the prosecution that because of enmity the deceased was given severe blows

with Phawra and axe by the accused persons, facing the trial. Identical is the statement of P.W.-2 Sri Mohan Singh, who is also one of the eye witnesses of the incident. It was stated by him that in the fateful morning at about 10-11 a.m. he saw the accused appellants Sri Shri Krishan alias Tejuwa and Sri Raghubir armed with Phawra and axe and they had given blows to the deceased with their respective weapons. He and P.W.-1, Sri Brindawan and the injured Sri Ram Dhan made alarm attracting the residents of the village, who had also seen the incident. The testimony of this witnesses was assailed on the ground that he is the partyman of the complainant and is a cooked up witness and he had not seen the incident.

6. Suffice is to mention that the testimony of the eye witness, which finds corroboration with the medical report cannot be discarded on the ground that he is the interested witness. Reliance may be placed in the cases of *State of Punjab Vs. Wassan Singh and Others*, and *Pulicherla Nagaraju @ Nagaraja Reddy Vs. State of Andhra Pradesh*, In the case of *Masalti Vs. State of U.P.*, the Apex Court observed:

... There is no doubt that when a criminal Court has to appreciate evidence given by witnesses who are partisan or interested, it has to be very careful in weighing such evidence. Whether or not there are discrepancies in the evidence; whether or not evidence strikes the Court as genuine whether or not the story disclosed by the evidence is probable, are all matters which must be taken into account. But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. Often enough, where factions prevail in villages and murders are committed as a result of enmity between such factions, criminal Courts have to deal with evidence of a partisan type. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct. The above view also finds support from the case of *Guli Chand and Others Vs. State of Rajasthan*,

7. The testimony of this witness is also evaluated with caution and it inspires confidence. He has given clear account of the incident and his presence cannot be ruled out. So is the position of the statement of P.W.-3, Sri Dharm Pal, who was also said to be present at the place of occurrence. He stated that after hearing hue and cry made by the complainant and Sri Mohan Singh he reached at the place of occurrence and saw the accused appellants Sri Shri Krishan alias Tejuwa, armed with Pharsa and Sri Raghubir armed with axe and they were giving blows to the deceased. The testimony of this witness has been assailed on the ground that he is a resident of a different place and it is not possible for him to reach at the spot at the relevant time. However, from the statement of this witness, it has come that from the place of occurrence his house is hardly 40-45

paces and after hearing the hue and cry of the complainant and other persons, he reached at the spot. Even this witness whose house is not very far from the place of occurrence, his presence cannot be ruled out. He has also supported to the prosecution version.

8. It has next been contended that the FIR version and the statements of the witnesses are not getting support from the medical report, which refers about the victim sustaining incised wounds, which are horizontal in shape. Even the Doctor has opined that if the deceased fell on the ground and phawra blows are given, that would only inflict such injuries. From the statement of the witness it is clear that the Kulhari blows were also given by the co-accused. P.W.-1, Sri Brindawan also stated that Sri Ram Dhan, the injured fell on the ground. Under such circumstances the incised wounds could have been caused by Phawra. The medical report also supports to the prosecution version.

9. As regards to the motive so assigned to the deceased, there is no dispute that the parties were having animosity with each other. In the past complaints were also lodged against them. Even proceedings under Sections 107/117 Code of Criminal Procedure (in short the "Code") were also initiated against them. Such motive also substantiated the FIR version. Reliance may be placed on the case of Ranganayaki Vs. State by Inspector of Police, wherein the Apex Court observed as under:

Motive for doing a criminal act is generally a difficult area for prosecution. One cannot normally see into the mind of another. Motive is the emotion which impels a man to do a particular act. Such impelling cause need not necessarily be proportionally grave to do grave crimes. Many a murders have been committed without any known or prominent motive. It is quite possible that the aforesaid impelling factor would remain undiscoverable. Lord Chief Justice Champbell struck a note of caution in *Red v. Palmer* (Shorthand Report at page 308 May, 1856) thus: "But if there be any motive which can be assigned. I am bound to tell you that the adequacy of that motive is of little importance. We know, from experience of criminal courts that atrocious crimes of this sort have been committed from very slight motives; not merely from malice and revenge, but to gain a small pecuniary advantage, and to drive off for a time pressing difficulties". Though, it is a sound presumption that every criminal act is done with a motive, it is unsound to suggest that no such criminal act can be presumed unless motive is proved. After all, motive is a psychological phenomenon. Mere fact that prosecution failed to translate that mental disposition of the accused into evidence does not mean that no such mental condition existed in the mind of the assailants. In *Atley Vs. State of Uttar Pradesh*, it was held "that is true, and where there is clear proof of motive for the crime, that lends additional support to the finding of the Court that the accused was guilty, but absence of clear proof of motive does not necessarily lead to the contrary conclusion". In some cases it may be difficult to establish motive through direct evidence, while in some other cases inferences from

circumstances may help in discerning the mental propensity of the person concerned. There may also be cases in which it is not possible to disinter the mental transaction of the accused which would have impelled him to act. No proof can be expected in all cases as to how the mind of the accused worked in a particular situation. Sometimes it may appear that the motive established is a weak one. That by itself is insufficient to lead to an inference adverse to the prosecution. Absence of motive, even if it is accepted, does not come to aid of the accused. These principles have to be tested on the background of factual scenario.

10. There is ample evidence to show the complicity of the accused appellant Sri Tejuwa in the aforesaid incident to have given Pharsa blows to the deceased inflicting serious injuries to him. As a result of those injuries the victim died. It has, further been argued that the accused appellant Sri Shri Krishana alias Tejuwa was hardly of 14 years of age at the time of the incident and he would be entitled for the benefit under U.P. Children Act, 1951. In that regard reference has also been given to the statement of the accused appellant recorded by the learned Sessions Judge u/s 313 of the Code on 18th September 1981 wherein he had stated his age to be 15 years of age. The learned Sessions Judge could not doubt about the age, so referred by the accused appellant nor any proceeding for making the determination of his age were initiated nor any observation was made by him questioning the age of the accused appellant, as required under Rule 50 of the General Rules (Criminal). In that context, reliance has been placed in the case of Nanak v. State of U.P. 1994 JIC 437 wherein the Apex Court also observed that where in the statement u/s 313 of the Code, the accused claims himself to be minor, the court trying the accused finds that he is involved in the incident, the learned Sessions Judge should invariably get the question of age determined by holding necessary enquiry in that regard. The child cannot be sent to prison. In the instant case, the learned Sessions Judge did not make any enquiry and so this part of the age, may be accepted.

11. Further enquiry was got done under order of this Court dated 13th August 2007. The Chief Judicial Magistrate taking into consideration the report of the Chief Medical Officer and other documents assessed the age of the accused appellant Sri Shree Krishan alias Tejuwa to be around 13/14 years at the time of the incident. Under such circumstances, it is also contended that the accused appellant was entitled for benefit under U.P. Children Act, 1951. Reliance has been placed on the case of Jayendra and another Vs. State of Uttar Pradesh, wherein the Apex Court held as under:

Section 2(4) of the Uttar Pradesh Children Act, 1951 (U.P. Act No. 1 of 1952) defines a child to mean a person under the age of 16 years. Taking into account the various circumstances on the record of the case we are of the opinion that the appellant Jayendra was a child within the meaning of this provision on the date of the offence. Section 27 of the aforesaid Act says that notwithstanding anything to the contrary in any law, no court shall sentence a child to

imprisonment for life or to any term of imprisonment. Section 2 provides, in so far as it is material, that if a child is found to have committed an offence punishable with imprisonment, the court may order him to be sent to an approved school for such period of stay as will not exceed the attainment by the child of the age of 18 years. In the normal course, we would have directed that the appellant Jayendra should be sent to an approved school but in view of the fact that he is now nearly 23 years of age, we cannot do so.

12. In the given circumstances of the case, the accused appellant Sri Shri Krishan alias Tejuwa, child on the date of occurrence, cannot be sentenced to life imprisonment. He is entitled for the benefit of the U.P. Children Act 1951, In the result, the conviction of the appellant Sri Shri Krishan alias Tejuwa for the offence u/s 302/34 IPC is maintained, but the sentence of the life imprisonment so awarded by the trial court is set aside. The appeal is partly allowed. The office is directed to return lower court record expeditiously along with a copy of this judgement to the trial court concerned.