
(2006) 10 AHC CK 0182
In the Allahabad High Court

State of U.P.

APPELLANT

Vs

Jamuna Chaubey, Lallan Chaubey and Vyas Chaubey

RESPONDENT

Date of Decision : 06-10-2006

Acts Referred:

Penal Code, 1860 (IPC) — Section 301, 302

Citation : (2006) 10 AHC CK 0182

Hon'ble Judges : V.D. Chaturvedi, J;M.C. Jain, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

M.C. Jain, J.—The State has preferred this appeal against the judgment of acquittal recorded on 13.5.1991 by the Sessions Judge, Ballia in S.T. No. 198 of 1987. The complainant Shiv Dutt Chaubey has also preferred a Criminal Revision No. 1140 of 1991 against the acquittal. Both the matters are being decided by this common order.

2. Jamuna Chaubey and his two sons Ram Vyas Chaubey and Lallan Chaubey (accused-respondents) were tried before the Sessions Judge in S.T. No. 198 of 1987. Out of them, Jamuna Chaubey died during the pendency of this appeal and the same abated against him under order dated 18.10.2005. Presently, the Court is concerned only with two other accused-respondents-Lallan Chaubey and Vyas Chaubey. The incident took place on 31.5.1987 at about 6 P.M. in village Akhar, Police Station Kotwali, Ballia and F.I.R. was lodged the same night at 8.55 P.M. by the complainant Shiv Dutt Chaubey PW 1. One Raj Kumari, married daughter of Shiv Dutt Chaubey, was murdered in the present incident. The distance of the police station from the place of occurrence was about 8 kilometres.

3. The broad essentials of the prosecution case as surfacing from the F.I.R. and the evidence adduced in the court may be set forth. The accused and the complainant Shiv Dutt Chaubey were collaterals. The house of the complainant Shiv Dutt Chaubey was to the north of that of the accused. It was his newly

constructed house. His old house was within abadi towards west. There had been some litigation between Shiv Dutt Chaubey and Jamuna Chaubey in respect of the sehan in between their houses. Shiv Dutt had instituted a civil suit and obtained ex- parte decree. Jamuna Chaubey moved an application to set aside the ex parte decree. He also instituted another suit in civil court claiming that Shiv Dutt Chaubey was living in the northern house as his licensee and had not vacated it in spite of termination of his licence. Raj Kumari was the married daughter Shiv Dutt Chaubey who had come to her parental house a few days before the incident. On the date of the offending event i.e. 31.5.1987 at about 6. P.M. the members of the family of Shiv Dutt Chaubey were outside towards east of their house. Om Narain-younger son of Shiv Dutt Chaubey began to sweep the land between two sehans viz. of the complainant and the accused. Lallan Chaubey forbade him from doing so, saying that the land belonged to him. When Om Narain protested that the land belonged to him, Lallan Chaubey attempted to assault him. Shiv Dutt, his son Om Prakash and three daughters Raj Kumari (deceased), Shiv Kumari and Prem Kumari, however, intervened. Lallan Chaubey retreated to his house and instantly came back armed with licensed double barrel gun. His brother Ram Vyas armed with spear and his father Jamuna Chaubey armed with lathi came behind him. They exhorted Lallan Chaubey to murder so as to put an end to the daily wranglings. Frightened by imminent danger, Shiv Dutt Chaubey and his family members began to raise alarm. Lallan Chaubey aimed his gun towards Shiv Dutt Chaubey. Raj Kumari tried to save him. The shot fired by Lallan Chaubey hit her (Raj Kumari) who was injured. Lallan Chaubey fired another shot towards Om Prakash but it missed the aim. The witnesses Ram Sakal Chaubey and Jagat Narain Chaubey PW 3 who had arrived there saw the incident. The accused then went back to their Baithaka.

4. Raj Kumari was brought to Bandha on a cot wherefrom she was taken to Ballia District Hospital in a tempo. She was declared dead there. Shiv Dutt Chaubey got the F.I.R. scribed by Shyam Bihari Singh and took it to the police station which was lodged there on 31.5.1987 at 8.35 P.M. A case was registered. The investigation was taken up by S.O. Har Govind Singh PW 8. He directed S.I. R.N. Dubey to conduct inquest of the dead body in District Hospital. He himself went to the spot after recording the statement of the complainant Shiv Dutt Chaubey and other available witnesses. He busied himself with the activities related to investigation such as spot inspection, collection of blood-stained and simple earth on 1.6.1987. He arrested Ram Vyas Chaubey on 2.6.1987 and after interrogation took search of his house and recovered double barrel gun used in committing the crime.

5. Post mortem over the dead body of the deceased Raj Kumari was conducted by Dr. S.N. Sinha PW 4 on 1.6.1987 at 12.30 P.M. The deceased was aged about 28 years and about 18 hours had passed since she died. The following ante mortem injuries were found on her person:

One firearm wound of entry measuring 14 cm x 9 cm x chest cavity deep lying

over medial upper-most part of right arm and adjoining part of upper most part of front of chest right side. Margins inverted. No blackening, tattooing etc. seen. Direction of the wound was medially inward, slightly downward from right to left. Head of humerus was punctured.

6. On internal examination, right clavicle and I, II and III ribs right side were found fractured. Pleura was lacerated and punctured on the right side. The right side lung was also punctured and lacerated. 12 small pellets were recovered from inside the injury and right lung apex. As per the opinion of the Doctor, the death had occurred due to shock and haemorrhage as "a result of ante mortem injuries.

7. The defence was of denial and false implication due to enmity.

8. To bring home the guilt to the accused, the prosecution examined 8 witnesses. Out of them, Shiv Dutt Chaubey complainant-PW 1, his daughter Prem Kumari PW 2 and Jagat Narain PW 3 were examined as eyewitnesses. Dr S.N. Sinha PW 4 had conducted autopsy on the dead body of the deceased whereas Head Constable Aniruddh Singh PW 5 prepared chick report and made entry in the General Diary regarding registering of the case. Constable Daya Shanker PW 6 and Constable Devendra Nath Rai PW 7. were witnesses of formal nature who filed affidavits. S.O. Har Govind Singh PW 8 was the Investigating Officer. One Sayta Deo Singh who was cattle pond Moharrir in 1987 was examined as DW 1. The defence also placed on record certain documents.

9. The evidence adduced in the court by the prosecution did not find favour with the trial judge. He recorded acquittal on these main grounds: The F.I.R. was ante-timed; the spot was not proved; there was inconsistency between ocular testimony and medical evidence; no independent witness had been examined.

10. We have heard Sri Karunanand Bajpayee, learned A.G.A. for the State-appellant, the counsel for the complainant and revisionist as well as Sri Om Prakash Misra counsel for the accused-respondents. The record is before us which we have carefully perused. The A.G.A. and the counsel for the complainant have vehemently argued that the impugned judgment is perverse and unreasonable. They submitted that the acquittal is based on faulty appreciation of evidence. Trivialities, according to them, have been blown beyond proportion by the trial judge. It has been contended that the evidence has to be reappreciated. They have urged that the prosecution clinchingly established that the offence was committed by the accused.

11. On the other hand, the counsel for the accused-respondents argued that since the learned trial judge has given cogent and convincing reasons for finding the accused not guilty of the charges levelled against them, the judgment of the lower court does not call for any interference.

12. This being an appeal against acquittal, we have gone through the evidence on record with a view to find out whether the view favourable to the accused taken by the lower court is based on the evidence on record and is reasonable. It

is well settled that in an appeal against acquittal, the appellate court is entitled to reappraise the evidence on record and it can interfere with the order of acquittal if it finds the view recorded by the court acquitting the accused to be unreasonable or perverse.

13. It should be stated before proceeding further that in the lower court, three eyewitnesses, namely, Shiv Dutt Chaubey PW 1 (informant-father of the deceased), Prem Kumari PW 2 (sister of the deceased) and Jagat Narain Chaubey PW 3 were examined. The names of Prem Kumari PW 2 and Jagat. Narain PW 3 find place in the F.I.R. lodged by Shiv Dutt Chaubey PW 1. The gist and central core of the testimony of the three eyewitnesses, taken cumulatively, was that the accused were collaterals of Shiv Dutt Chaubey. Shiv Dutt Chaubey's younger son Om Narain began to sweep the land between the sehan of the parties. Lallan Chaubey asked him not to do so on the ground that the land belonged to him. When Om Narain retorted that the land actually belonged to him, Lallan Chaubey attempted to assault him (Om Narain). Lallan Chaubey went to his house and almost immediately came back with double barrel gun followed by Ram Vyas armed with spear and Jamuna Chaubey armed with lathi. At the exhortation of the last two, Lallan Chaubey opened shot. Raj Kumari tried to stop him. The shot fired by Lallan Chaubey hit her. She fell down receiving the injury. Lallan Chaubey opened another shot towards Om Prakash, but missed the target. It was specifically stated by Shiv Dutt Chaubey PW 1 that he used to live with his family in the house in the eastern sehan of which the incident took place. He, Prem Kumari PW 2, Raj Kumari deceased, Om Prakash and Krishna Kumari were sitting outside the house when Om Narain started sweeping the sehan just before the actual incident. Sweeping of sehan by Om Narain sparked the trouble on Lallan Chaubey objecting to the sweeping of the sehan claiming the same to be belonging to him and Om Narain retorting by insisting about his ownership of the same (sehan). Lallan Chaubey attempted to assault Om Narain and then went to his house with instant reappearance with double barrel gun whereby he opened the shot which killed Raj Kumari.

14. Jagat Narain PW 3, also a collateral of Shiv Dutt Chaubey and Jamuna Chaubey, explained his presence in that he was at the new house of Ram Sakal. He and Ram Sakal Chaubey had proceeded to the spot on attention being attracted by the shouts emanating from that side. He witnessed the actual incident of shooting by Lallan Chaubey hitting Raj Kumari. The shooting, according to him, was done at the exhortation of Jamuna Chaubey and Ram Vyas Chaubey armed with spear and lathi respectively. The shot had hit Raj Kumari because she tried to stop Lallan Chaubey from shooting. The site-plan shows that newly constructed house of Ram Sakal was a little north east of the spot with no hindrance or obstacle in between. The second shot was also allegedly fired by Lallan Chaubey towards Om Prakash but it did not hit him. He accompanied Shiv Dutt Chaubey, carrying Raj Kumari on a cot upto Bandha where Mahanth Pathak and several others joined. After managing a tempo, Mahanth Pathak, Om Prakash and Shiv Dutt Chaubey carried Raj Kumari to Ballia.

15. On careful consideration, we are of the opinion that the acquittal of the accused-respondents Jamuna Chaubey and Ram Vyas Chaubey out of whom Jamuna Chaubey died during the pendency of the appeal, is perfectly justified, not warranting any interference therewith. None of them was actual assailant. Nobody sustained any injury of the weapons allegedly held by them (spear and lathi). They did not even attempt to use them. Exhortation is a weak type of evidence. Lallan Chaubey with blood in his eyes and armed with double barrel gun hardly needed any exhortation. Therefore, on careful scrutiny of the evidence and attending circumstances, they (Jamuna Chaubey and Ram Vyas Chaubey) deserved to be acquitted. We will not interfere with their acquittal.

16. However, we have not the slightest doubt that the finding of acquittal recorded by the trial judge in favour of the actual assailant Lallan Chaubey is manifestly erroneous and contrary to evidence. He has disproportionately blown the trivialities and insignificant aspects of the matter to justify his acquittal. We are going to discuss it threadbare in the succeeding discussion. It is obvious that there was general indisposition and incredibility about anything and everything put forth by the prosecution to establish the guilt of Lallan Chaubey, albeit supported by sterling evidence and clinching circumstances.

17. The finding of the trial judge is wholly unwarranted that F.I.R. was ante timed. He drew this conclusion by observing that though the Investigating Officer reached the spot during the night, but started the investigation after sunrise. It has to be pointed out that the incident took place on 31.5.1987 at about 6.00 P.M. Immediately after the incident, the victim was taken to District Hospital, Ballia on a cot upto Bandha and on a tempo thereafter. The Doctor declared her to be dead in the hospital. The distance of the police station from the place of occurrence was 8 kilometres. Shiv Dutt Chaubey PW 1 got the F.I.R. scribed by Shyam Bihari in the hospital and then took it to the police station where he lodged it at 8.55. P.M. Actually, the F.I.R. was lodged in reasonable time, looking to the sequence detailed above. The investigation had been started immediately after the lodging of the F.I.R. Investigating Officer Har Govind PW 8 stated that the F.I.R. had been lodged at the police station in his presence. He deputed S.I. R.N. Dubey to go to the District Hospital, Ballia to conduct inquest proceedings of the deceased. The statements of the informant and of other two eyewitnesses were recorded by him at the Police Station itself whereafter he had proceeded to the spot. He reached there at about 10.30 O'clock in the night. No question was put to him in his cross-examination as to why he had not prepared the site-plan in the night. In our opinion, the spot could exactly be inspected in proper light after day break, because even bloodstained earth had to be collected. So, it was wholly erroneous to jump to the conclusion that the F.I.R. was ante-timed simply because the Investigating Officer prepared the site-plan in the morning of 1.6.1987. The F.I.R., as we said, was actually lodged within reasonable time (at 8:55 P.M. on 31.5.1987) as proved by the prosecution. The finding recorded by the trial judge of the F.I.R. being ante-timed is unfounded.

18. The trial judge has tried to make mountain of a mole that the dead body of Raj Kumari was brought to the hospital at 7.35 P.M. by Mahanth Pathak son of Gopal Pathak resident of Village Nagwa. In letter Ext. Ka-7 the deceased Raj Kumari was shown as wife of Chandra Prakash Pathak with no mention of village Akhar where the accused and complainant resided and where the incident took place. The presence of the complainant or any other person of the village Akhar had also not been mentioned in this letter. The trial judge deduced thereby that the spot was not proved and it had been changed because the defence suggestion was that she was killed in some incident involving her husband and family members. She was taken to the hospital by her husband's cousin Mahanth Pathak for treatment.

19. It appears that the trial judge gave free flight to his imagination to come to such a fantastic conclusion. No doubt, the deceased was a married lady. It came in the testimony of Shiv Dutt Ghaubey PW 1 that she had been married to Chandra Prakash of village Nagwa. Nagwa was at a short distance from village Akhar where the incident took place. Mahanth Pathak was admittedly the cousin of Chandra Prakash and as per testimony of Shiv Dutt Chaubey PW 1 and Jagat Narain PW 3, some persons of Nagwa including Mahanth Pathak had also joined them at the Bandha wherefrom Raj Kumari was taken to the hospital on a tempo. Shiv Dutt Chaubey PW 1 explained that he was also present in the hospital, when Raj Kumari was taken there on tempo, but it was Mahanth Pathak who had gone upto doctor and talked to him (doctor). It did not at all mean that the incident had taken place at some other place and the spot had been changed. We should cite with profit the law laid down by the Apex Court in the Case of Sukhchain Singh v. State of Haryana and Ors. 2002 Supreme Court Cases (Cri) 961 that merely because of non-mention of name of deceased's brother (PW 1) in the medico-legal report prepared by the doctor in the hospital, it could not be presumed that PW 1 had not accompanied the deceased in the hospital. Names of all the relatives of the deceased need not be mentioned in the report. It is neither the requirement of law nor usually expected that names of all the relatives of the injured should be mentioned in the medico-legal report prepared by the doctor. Indeed, Mahanth Pathak was a close relative of deceased, being cousin of her husband. There was nothing unnatural or unusual that having reached Bandha, he accompanied her with the complainant in the tempo to the hospital and it was he who talked to doctor to give the details of the victim. She being a married lady, he described her as wife of Chandra Prakash (instead of by the name of daughter of Shiv Dutt Chaubey) which is the usual mode of describing a married lady. Moreover, at that time the attention of all the relatives of the deceased who were around was focussed to save her life, if possible. It was only the doctor (medical expert) who declared her to be dead. So, no deliberations were required or expected to be made amongst the persons who had taken her to the hospital as to whether she was to be described as wife of Chandra Prakash or as the daughter of complainant.

20. There was another factor which clinchingly proved the place of the incident

as the spot given by the prosecution. The Investigating Officer had collected from the spot bloodstained and simple earth. In report Ext. Ka-23 the Chemical Examiner found that the bloodstained earth collected from the spot was of a human blood of "O" group. It is to be noted that doctor conducted autopsy after taking off her clothes i.e. dhoti, petticoat, blouse, bra and Angochha. They had also been sent to the Chemical Examiner for examination and as per report Ext. Ka-23, the blood on bloodstained earth, dhoti, bra and Angochha was human blood of "O" group. On pieces of blouse, the blood spots were not sufficient for classification. So, the human blood on the bloodstained earth collected from the spot as also on the clothes of the deceased being of same group "O" cemented the prosecution version of the incident having taken place at the complained spot.

21. The trial judge also committed grave error in saying that there was inconsistency in ocular testimony and medical evidence. The case of the prosecution as proved by the testimony of three eyewitnesses was that single shot opened by Lallan Chaubey had hit the deceased. As per post mortem report, she did receive a single fatal shot. It could hardly be pronounced that there was any inconsistency between medical evidence and ocular testimony. The trial judge observed that as per the site-plan prepared by the Investigating Officer, the shot had been fired from a distance of seven steps. Jagat Narain Chaubey PW 3 gave this distance as 9-10 steps. The trial judge reasoned that if the shot was fired from a distance of 7-8 steps, the pellets would not have entered the body in a bunch. In that eventuality, according to him, there must have been much larger dispersal. Suffice it to say that distance spoken by the witnesses is not to be calculated meticulously and mathematically as with a measuring tape. The Apex Court has held in the case of State of Uttar Pradesh Vs. Sughar Singh and Others, that when direct evidence of the eyewitnesses is available, inconsistency relating to the distance from which the shot was fired between the evidence of medical expert and eyewitness is of no significance, the prosecution evidence pertaining to assault by guns and pistol substantially tallying with medical evidence. The analogy of this case squarely applies to the present situation. The trial judge tried to find conflict between medical evidence and ocular testimony on this premise also that as per the testimony of the eyewitnesses Lallan Chaubey fired shot after stepping on the Chabutara-a. higher platform. The report of post mortem showed that the direction of the injury was downward. So, the injury could not have been caused to Raj Kumari in the manner alleged by the prosecution. We should point out that such hair splitting and pedantic approach adopted by the trial judge did not justify the finding of acquittal of the shooter-Lallan Chaubey. The Supreme Court has held in the case of Birendra Rai and Ors. v. State of Bihar 2005 SCC 1455 as under:

Much significance should not be attached to the fact that some of the wounds showed an upward trajectory. A bullet may possibly be deflected if it hits a hard surface. The fact remains that all the shots fired have caused wound of entry as well as exit wound, and from the description of the wounds given by the doctor it appears that the firing was done from very close range. The evidence of the

witnesses is to the same effect. They have clearly stated that they came near the deceased after firing took place. There was indiscriminate firing at the deceased who fell down after receiving the first injury. One cannot assume that the deceased was lying still in one posture after falling on the ground. He must have been writhing in pain when several shots were fired at him, and in that process several injuries were caused to him. So viewed, there is no inconsistency between the ocular evidence and medical evidence on record in this case.

22. The analogy of the law laid down by Supreme Court in the above case also negates the faulty approach of the trial judge. The single shot received by the deceased fired by Lallan Chaubey had caused extensive damage inside. Right clavicle and I, II and III right ribs were fractured. Pleura was lacerated and punctured on the right side. Right lung was punctured. So, in the shot hitting her bony substance, there could hardly be any other effect than found in autopsy report. There was no ground to reject the prosecution case as against the actual shooter whose single shot killed the victim.

23. The criticism of the prosecution case by the trial judge on the premise of the absence of other independent witnesses was also not justified. There was nothing to show that anyone else had witnessed the incident and that the prosecution deliberately withheld any such witness.

24. The criticism of the witnesses of the prosecution on the ground that they were interested persons could also not be a ground to disbelieve them in the face of reality that their testimony insofar as it related to the actual assailant Lallan Chaubey did not suffer from any infirmity and, in fact, had the ring of truth. It has been held by the Supreme Court in the case of Angnool and Others Vs. State of Uttar Pradesh, that if the witness is brother of the deceased, the fact of his relationship would add to the value of his evidence because he would be interested in getting the real culprit, rather than innocent persons, punished. Again, Supreme Court held in the case of Piara Singh and Others Vs. State of Punjab, that the evidence of interested or inimical witnesses has to be scrutinized with care but cannot be rejected merely on the ground of being a partisan evidence. If on perusal of the evidence the court is satisfied that the evidence is creditworthy, there is no bar to the court relying on the said evidence. In the case of State of Uttar Pradesh Vs. Suresh alias Chhavan and Others, the Apex Court held that the statement of a family member of the deceased cannot be rejected on the ground that he is related to the victim. What is required is that the statement is to be scrutinized with care.

25. Shiv Dutt Chaubey PW 1 and Prem Kumari PW 2 were most natural witnesses of the incident which occurred in their shenan when they were outside their house. The presence of Jagat Narain PW 3 could also not be doubted at all because he was present at the house of Ram Sakal which was in the north east of the spot. Ram Sakal was his own uncle. Therefore, his presence there in the evening time could not be viewed with suspicion. It mattered not that he was bracketed with Ram Sakal and Shiv Dutt Chaubey complainant in some litigation against Jamuna

Chaubey.

26. On careful scrutiny of the evidence on record and attending circumstances, we are of the firm opinion that the acquittal recorded by the trial judge in favour of accused Lallan Chaubey is illegal, perverse and against the weight of evidence. It is based on flimsy and untenable grounds as we discussed hereinabove. Letting guilty escape is not doing justice according to law. The record and evidence furnished sterling proof for the conviction of the assailant- shooter Lallan Chaubey whose shot killed the unfortunate Raj Kumari. In view of Section 301 of I.P.C. it has no effect at all that he did not intend to cause her death. For the sake of facility we extract below Section 301 I.P.C.:

301. Culpable Homicide by causing death of person other than person whose death was intended: If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause.

27. Unfortunate lady Raj Kumari was killed by Lallan Chaubey simply because she tried to stop him from firing on her brother/father.

28. Learned Counsel for the accused-respondents also urged that the gun of Lallan Chaubey taken in possession by the Investigating Officer was not sent to the Ballistic Expert. We do not think that it produced any adverse effect on the prosecution case which stood fully established against him (Lallan Chaubey) even without such comparison. We reject this argument.

29. As an upshot of the above discussion, we partly allow this appeal. The acquittal of the accused-respondent Lallan Chaubey is reversed. He is held guilty for the offence punishable u/s 302 I.P.C. for murdering Raj Kumari. He is convicted u/s 302 I.P.C. and sentenced to life imprisonment. As he is on bail, he shall be arrested and sent to jail by the Chief Judicial Magistrate, concerned. The acquittal of the accused-respondent Ram Vyas Chaubey recorded by the trial judge is upheld. The third accused-respondent Jamuna Chaubey has died during the pendency of the appeal and the appeal against him has abated.

30. Criminal Revision No. 1140 of 1991 also stands disposed of in view of the above order.

31. The Chief Judicial Magistrate, Ballia is directed to cause Lallan Chaubey to be arrested and lodged in jail to serve out the sentence of life imprisonment awarded to him. The Chief Judicial Magistrate, Ballia shall send compliance report within two months.

32. Certify the judgment to the lower court immediately.