
(2014) 02 AHC CK 0065
In the Allahabad High Court
Case No : Government Appeal No. 1563 of 1983

State of U.P.	Vs	APPELLANT
Rajvir		RESPONDENT

Date of Decision : 24-02-2014

Acts Referred:

Penal Code, 1860 (IPC) — Section 114, 302, 323, 34

Citation : (2014) 2 ACR 1561

Hon'ble Judges : Satish Chandra, J; Rakesh Tiwari, J

Bench : Division Bench

Advocate : P.C. Srivastava and Ajay Kumar Pandey, Advocate for the Respondent

Judgement

Rakesh Tiwari, J.—Heard learned A.G.A., for the appellant. Sri P.C. Srivastava for the informant, Sri Ajay Kumar Pandey, counsel for the accused-respondents and perused the record.

2. This appeal has been preferred by the State of U.P. challenging the validity and correctness of judgment and order dated 31.3.1983 passed by Special Judge, Bulandshahr in Session Trial No. 476 of 1981, State v. Rajvir and another, acquitting accused respondents Rajvir and his brother Somvir of the charges punishable under Sections 302 read with Section 114, 302 read with 34, 323 and 302. I.P.C.

3. The incident is said to have taken place on 27.2.1980 at about 11 a.m., report of which was lodged by first informant Durga Prasad Sharma son of Dhurimal Sharma, resident of village Karaura, Police Station Pahasu, district Bulandshahr, at 1.30 p.m. against the aforesaid two accused persons.

4. Perusal of the F.I.R. reveals that accused Rajvir suspected that Kanta (since deceased) was a police informer who used to report the police about his activities. On account of this misplaced suspicion, accused Rajvir harbored grudge against Kanta. On 27.2.1980 at about 11 a.m. when Kanta was washing clothes at a small water tank near the tube well of Bhagwati Prasad in village

Karora, accused Rajvir armed with a kassi came there and washed his feet in the aforesaid water tank. On this Kanta protested and some altercation took place between them and both accused Rajvir and Kanta grappled with each other. At that time, Ganga Sahai, son of Jivan, resident of Atrauli, P.S. Atrauli, district Aligarh, who was a servant of Bhagwati Prasad, Shafi Mohammad son of Kanfi Khan and Raghunath son of Chheda Lal Sharma, who were also resident of the village of the informant, came there alongwith the informant. They intervened and separated both of them. Accused Rajvir went away picking up his kassi. In the meantime, Somvir, brother of accused Rajvir armed with a lathi came and inquired as to what had happened, on which Rajvir told him that Kanta has made his life a hell. On this, Somvir exhorted to kill Kanta, whereupon Rajvir gave a blow with his kassi on the head of Kanta with the intention to kill him and Somvir also gave 2-3 blows of lathi, as a result of which Kanta fell down and died on the spot. When the accused were tried to be caught, they ran away saying that they are going to come again well prepared and shall also see them.

5. A written report of the incident was submitted by informant Durga Prasad Sharma, son of Purimal Sharma, resident of village Karora, on the basis of which, check report was prepared by Har Swaroop Sharma son of Sri Kanhaiya Lal Sharma, who was posted at police station Pahasu and F.I.R. was lodged as stated above.

6. Investigation was taken over by Hukum Singh, S.O. who immediately went to the place of the incident, prepared inquest report in presence of Panches, sealed the dead body and sent it to District Hospital Bulandshahr on the same day through constable C.P. 285 Mamchand and C.P. 129 Balakram, both of whom were posted at police station Pahasu. He also prepared site plan Ext. Ka-7 of the place where the dead body was found lying on a cot in the gher of deceased Kanta as well as site plan Ext. Ka-8 of the place of occurrence and also took into possession blood stained and plain earth from near the tube well.

7. Body of deceased Kanta was received by the doctor on 28.2.1980 and postmortem examination was conducted by Dr. Mittal on the same day at 3 p.m. Probable age of the deceased was noted by the doctor to be 30 years and his death was stated to be approximately a day before. The deceased was of average muscularity, rigor mortis was present all over, both eyes were half open. The deceased had following ante-mortem injuries on his body:

1. Incised wound 4"x 3/4" brain matter deep top of head middle.

2. Contusion 6" x 3/4" front of Rt. thigh upper part.

8. Parietal bone of skull was found fractured. Membranes under the injury No. 1 was found incised in area of 4"x 1/2" and brain incised in 4" x 1/2" x 1" deep at the top of parietal lobe was noted by the doctor, about 4 oz. of watery fluid was found present in the stomach, gases were present in small and large intestines which also contained fecal matter. The doctor reported that death was caused due to shock and haemorrhage as a result of injuries aforesaid.

9. After completion of investigation, charge-sheet was submitted by the Investigating Officer against the accused respondents. After committal of the case to the court of session, it was recorded as Session Trial No. 476 of 1981. Charge u/s 302, I.P.C. was framed against Rajvir whereas charges under Sections 114, 302, 302/34 and 323 were framed against accused Somvir, to which they pleaded not guilty and claimed to be tried.

10. Durga Prasad and Ganga Sahai, who are said to have intervened when altercation took place between the accused and Kanta (since deceased), entered the witness box as P.W. 1 and 2 respectively. The other two persons namely Shafi Mohammad and Raghunath who are also said to have intervened in the matter at the first instance, were not examined by the prosecution. It appears that the prosecution moved the court by means of an application that both these persons had colluded with the accused persons, hence they are not prepared to support the prosecution case. In the circumstances, as per the request of the prosecution, both of them were discharged.

11. After hearing counsel for the parties and on perusal of the record, the trial court extended benefit of doubt and acquitted both the accused Rajvir and Somvir of the charges framed against them vide its judgment and order dated 31.3.1983.

The impugned Judgment and order has been challenged by the State on the grounds, that the trial court has erred in holding that from the reading of F.I.R. it appears that P.W. 1 Durga Prasad was not present when grappling took place between accused Rajvir and Kanta (since deceased) and further erred in doubting presence of Ganga Sahay (P.W. 2) at the place of the incident.

12. According to learned A.G.A., Durga Prasad (P.W. 1) is admittedly a cousin of Kanta (since deceased) and Ganga Sahay (P.W. 2) was employed at the tube well of Bhagwati Prasad near which the incident is said to have taken place. It is stated that their testimonies support the medical evidence and corroborate the F.I.R.. It is argued that trial court has wrongly held that Ganga Sahay (P.W. 2) had tried to shift the place of occurrence from western side to the eastern side of the tube well which misled the trial court although the prosecution could not gain anything by shifting the place of incident, hence the testimony of P.W. 2 Ganga Sahay was wrongly disbelieved by the trial court. According to him, inconsistencies about the number of lathi blows on the body of deceased Kanta, was insignificant for the reason that nobody counts the number of blows at the time of an incident or it may also be that the lathi blows may not hit or injure the person on whom it is inflicted, and therefore, acquittal of the accused persons Rajvir and Somvir is against the weight of evidence on record.

13. Sri P.C. Srivastava appearing on behalf of the informant, has supported learned A.G.A. and adopted the arguments advanced by him. However, he further relied upon paragraph 2 of the statement of P.W. 1 Durga Prasad and submitted that his statement clearly shows that the incident had occurred in two

parts. Firstly, when some scuffle took place between Rajvir and deceased Kanta and there was grappling between them, after which accused Rajvir went 20-25 paces away and secondly, when he came with his brother Somvir and assaulted Kanta (since deceased) on his head by kassi and accused Somvir assaulted him by his lathi. It is stated that injuries said to have been caused in the aforesaid manner by the accused persons as stated by Durga Prasad P.W. 1, are fully supported by the medical evidence on record. He has then placed the statement of Ganga Sahay P.W. 2 and argued that he has specifically deposed that Rajvir assaulted Kanta (since deceased) by kassi whereas accused Somvir had assaulted Kanta by lathi. This version of P.W. 2 also finds support from the postmortem report and that these statements of P.W. 1 and P.W. 2, are corroborated by the statement of Dr. V.P. Mittal, P.W. 4 who has described the injuries on the body of the deceased in his postmortem report.

14. Per contra, learned counsel for the accused-respondents submitted that the trial court has considered the site plan, postmortem report and evidence of the witnesses. In this backdrop, the trial court considered the question as to whether the evidence of Durga Prasad P.W. 1 and Ganga Sahay P.W. 2 should be believed or not. On this point, the trial court after considering the evidence, has assigned its reasons in paragraphs 8, 9 and 10 of the impugned judgment, for coming to the conclusion that witnesses produced by the prosecution were not reliable and that their statements had no credence. The trial court has raised serious doubts about the place of occurrence and has given cogent reason for recording a finding that it was improbable that Ganga Sahay P.W. 2 would have reached the tube well while he was on his way to his agricultural fields as the tube well did not fall in his way. In view of the admission of P.W. 2 Ganga Sahay that Durga Prasad P.W. 1 was not present and had reached afterwards the murder of Kanta had taken place, the testimonies of P.W. 1 and P.W. 2 were rightly discarded for they do not measure the standard fixed by various pronouncements for judging the evidence of a partisan witness or a relation of victim of an offence.

15. Findings recorded by the trial court in paragraphs 8, 9 and 10 of the impugned judgment, reads thus:

8. The first point worth giving serious consideration is whether the evidence of Durga Prasad and Ganga Sahai should be believed or not. Names of other two witnesses like Shafi Mohammad and Raghunath Singh have been mentioned in the F.I.R. but none of them has been produced as a witness in court. Rather an application was given on behalf of the prosecution saying that both these witnesses had colluded with the accused and hence they were not prepared to support the prosecution case. On the request of the prosecution those two witnesses were discharged. P.W. 1 Durga Prasad admittedly is a cousin brother of deceased Kanta. He had also admitted in cross-examination that his uncle Kishori Lal before this occurrence, as well as witness Raghunath Singh had a Marpit with Bengali alias Roshan Lal, father of the accused. Although he denied that on account of his marpit his relations with the accused became strained, but the fact

of a marpit between his uncle and the father of the accused cannot be overlooked. It must have generated a bad feeling between this witness, his uncle Kishori Lal and the accused. In this background, it is necessary that precaution should be exercised in judging his evidence. The main ground on which his evidence has been attacked by the defence is that he had not reached the place of occurrence at the time of the marpit. The argument of the defence has been based upon the impossibility of this witness to have reached the tube well at the time of the murder. He admitted in cross-examination that the tube well was situated at a distance of about 2-1/2 furlong from his residence in village Karora. In his statement in court he said that he was going from his house in the village to his field when he reached the place of occurrence. He was asked about the location of his fields and he said that these were situated on the northern southern and the western direction of the village and he also admitted that the tube well in question was situated in the eastern direction of the village. Therefore, when he started from his house he would, in order to reach his fields, go to west north or south direction in which his fields lay but not towards eastern direction where the tube well was situated. Hence, it was not possible for him to have reached the place of occurrence if his intention was to go to his field. He has further complicated the position by not mentioning in the F.I.R. that he was going to his field when he left his house in the village. The F.I.R. is silent about the intention of the visit of this witness to the tube well. In this context the statement of Ganga Sahay, the other witness is also very important. In his cross-examination he has admitted that after deceased Kanta had fallen down then the members of his family like Durga. Raghunath and Shaft Mohd. had arrived at that place. This confirms the conclusion that witness Durga Prasad had not come to the place of occurrence at the time when the murder was being committed. The prosecution argued that the interpretation of defence on this reply of witness Ganga Sahai is wrong. According to the prosecution, this statement of Ganga Sahay means that Durga Prasad, Raghunath and, Shafi Mohammad had come to that place after he had fallen down but this does not appeal to reason. It is in the F.I.R. that Shaft Mohammad and Raghunath were sitting at the tank when the occurrence was taking place. There was no sense in Ganga Sahai saying that they and Durga had come there after Kanta had fallen down. Thus, the admission of Ganga Sahai leads me to the conclusion that witness Durga Prasad was not present at the time when the murder had taken place and he reached there afterwards. Apart from this admission it also seems improbable that he would have reached the tube well while he was on his way to his agricultural field as the tube well would not fall in his way. Therefore, the evidence of this witness does not measure up to the standard which is fixed for judging the evidence of a relation of a victim of an offence.

9. The next eye-witness is Ganga Sahai. He was the servant of owner of the tube well and used to be present at the tube well for its care. He has given an eyewitness account of the occurrence. The fact that he was a servant of the owner of the tube well has neither been challenged nor controverted by the

defence. Therefore, it is established that witness Ganga Sahai was servant of the owner of the tube well employed to look after the working of the tube well. Therefore, his presence at the place of occurrence cannot be doubted. He did not have any enmity with the accused. They have not made any suggestion of any enmity with this witness. He had no interest either in the complainant or the deceased. Therefore, he is absolutely an independent witness. His presence at the place of the occurrence cannot be doubted. Unfortunately he has changed the place of occurrence. The site plan shows that the occurrence had taken place on the eastern side of the tank and on the northern side of the pipe running from the tube well building to the tank. But this witness said that accused Rajvir gave the kassi blow on the head of the deceased on the western side of the tank which means that according to him the occurrence had taken place in the rasta running north south situated on the western side of the tank. No explanation could be given for this contradiction. The prosecution also could not reconcile the contradiction in any manner. If we read carefully the evidence of this witness, it becomes clear, that this contradiction has not cropped up in his statement unwillingly. According to him, he was sitting in front of the tube well. The site plan shows that the front of the tube well faces south. If he was facing south he could not have seen the occurrence which had taken place according to the prosecution towards the western side of the tube well building. He was busy in eating his lunch. The possibility is there that he was not able to see the occurrence taking place. This possibility gets credence from the fact that he had changed the place of occurrence.

10. The defence has suggested that the occurrence had not taken place at that spot which the prosecution had tried to establish. It was suggested that deceased Kanta was murdered somewhere else and the place of occurrence near the tube well had been engineered in order to facilitate the presence of witnesses. In this connection the statement of the Investigating Officer is also worth consideration. He has said that he had taken blood stained and plain earth from the place of occurrence, i.e., the western side of the tube well. He did not prepare any memo regarding the taking of the blood stained and plain earth. It is an ordinary thing which every Sub-Inspector of Police would know that whenever during the investigation of the case they take any incriminating thing into possession or any property which can throw light on the facts of the case, a seizure memo should always be prepared. But no seizure memo regarding the taking into possession of the blood stained and plain earth was prepared by the Investigating Officer. It is the case of the prosecution that when the Investigating Officer reached the place of occurrence the dead body was not lying at the place of occurrence. Rather it had been removed to the gher of the deceased. The Investigating Officer prepared the inquest report on the dead body in the gher of the deceased. In this situation it was incumbent upon the Investigating Officer that he should have prepared a memo regarding the taking into possession of the blood stained and plain earth from the place of occurrence and the memo should have been signed by two independent witnesses who might have been

summoned by court for testify as to the place from where the blood stained and plain earth was taken into possession by the Investigating Officer. In absence of any seizure memo the statement of the Investigating Officer that he had taken blood stained and plain earth from the place of occurrence near the tube well becomes suspect. Apart from this the blood stained and plain earth was not sent to the chemical examiner for analysis to know whether the blood which the Investigating Officer found was human blood or not. There is no evidence on the record that the blood stained earth was sent to the Chemical Examiner for analysis. In the event that the Investigating Officer had not prepared a memo it was the bounden duty of the Investigating Officer to have got the so called blood stained earth analysed from Chemical Examiner in order to establish that the blood stained earth contained human blood. It was stated in cross-examination by Durga Prasad that the dead body of deceased was taken on a cot from the tube well to the gher of the deceased. The strings of the cot must have been soiled with blood. The cot as well as the strings were not taken into possession by the Investigating Officer. So it cannot be said with certainty that the dead body of deceased Kanta was taken on a cot from the place of occurrence to his gher. Considering this aspect of the evidence coupled with the change which Ganga Sahai has made in the place of occurrence and the doubt about the arrival of Durga Prasad at he tube well at the time of the murder, gives some weight to the defence story that the murder had not taken place at the place of occurrence as alleged by the prosecution but some where else. If this doubt is created after reading the entire prosecution evidence, then it renders the prosecution case itself doubtful and the benefit should be given to the accused.

16. From a perusal of aforesaid findings read alongwith statement of the witnesses, we find that the findings recorded by the trial court are based on sound and cogent reasons which cannot be said to be either perverse or cryptic.

17. In our view, the trial court has rightly found that if the presence of P.W. 1 is doubtful then the entire case of the prosecution emerging from the F.I.R. becomes doubtful and that prosecution has failed to establish the place of occurrence inasmuch as no blood stained earth was either taken or was sent to the Chemical examiner for analysis to show that it was human blood. Even no blood stained strings of the cot soiled with blood were collected by the Investigating Officer even though dead body of the deceased had been shifted from the place of occurrence before arrival of police as admitted by the prosecution.

18. That apart, the weapon of assault, i.e. kassi by which accused Rajvir is alleged to have caused injury to Kanta (since deceased) has neither been recovered by the Investigating Officer during investigation nor sent for examination so as to establish the guilt of the accused-respondent.

19. In view of what has been stated above as well as the findings recorded by the trial court in paragraphs 8, 9 and 10 of the impugned judgment, we are of the view that reasons assigned by the court for recording the finding of acquittal,

are sound, cogent and convincing and there is no perversity in the said findings and a reasonable view appears to have been taken by the trial court on the basis of the evidence on record, and hence the judgment of acquittal passed by the trial court, deserves to be upheld.

In the result, we find no merit in the present appeal and the same is accordingly dismissed upholding the impugned judgment and order passed by the trial court.