

(2006) 01 AHC CK 0043

In the Allahabad High Court

Case No : Government Appeal No. 1263 of 1982

State of U.P.

APPELLANT

Vs

Virendra alias Buddhu, Ram Asre alias Tami and Girish alias
Gappu

RESPONDENT

Date of Decision : 13-01-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 107, 117
Penal Code, 1860 (IPC) — Section 302, 307, 34

Citation : (2006) 01 AHC CK 0043

Hon'ble Judges : M.C. Jain, J;M. Chaudhary, J

Bench : Division Bench

Advocate : K.P. Shukla and K.C. Saxena and A.G.A, for the Appellant; P.N. Misra, A.P. Kushwaha, Kamal Krishna, Surendra Singh and Apul Misra, for the Respondent

Judgement

M. Chaudhary, J.—I his is a government appeal filed on behalf of the State from judgment and order dated 14th of January, 1982 passed by III Additional Sessions Judge, Farrukhabad in Sessions trial No. 306 of 1981 State v. Virendra @ Buddhu and Ors. acquitting all the three u/s 302 read with Section 34 IPC. Accused Girish was acquitted u/s 307 IPC also.

2. Brief facts giving rise to this appeal are that 4:45 p.m. on 5th of October 1979 Smt. Sarla Devi, wife of the deceased lodged an FIR at police station Shamshabad, District Farrukhabad alleging that Pyarey Lal happened to be her grand father in relation and he executed sale deed of his landed property in favour of her son Pradeep Kumar. Subsequently Het Ram and Sahdev got deed of will regarding the said property executed by their maternal uncle Pyarey Lal in their favour. Therefore litigation was going on between her husband Rameshwar Dayal on one hand and Het Ram and Sahdev on the other over that landed property. Three months prior to the occurrence Sahdev was murdered and for that murder her son Pradeep Kumar, brothers Jaidev and Rakesh were falsely roped in as accused, and Pradeep was still in jail at the time of murder of his

father Rameshwar Dayal. Proceedings u/s 107/117 of the Code of Criminal Procedure Were also going on between Rameshwar Dayal on one hand and Het Rant on the other. Met Ram and his son Virendra @ Buddhu were nursing grudge against Rameshwar Dayal. Farly in the morning on 5th of October, 1979 Rameshwar Dayal alongwith his wife Salra Devi and daughter Guddi went to river Ganges for taking bath on the occasion of Purnmasi and thereafter as they were returning hack after seeing Patavar in their field through the field of Raghuvar Dayal and reached near mango tree standing in that field at about 10.00 a.m. Virendra @ Buddhu alongwith his cousins Ram Asrey @ Tami and Girish @ Gappu armed with countrymade pistols emerged from Patavar standing at the medh of Chhavinath and rushed towards Rameshwar Dayal. Ram Asrey was shouting that he should be caught hold of as they had to take revenge of the murder of their maternal uncle (Sahdev). Then Rameshwar Dayal tried to run for his life but he could not escape and Virendra and Girish caught hold of him under the mango tree and Virendra and Ram Asrey fired at him with country made pistols causing fatal injuries to him On hue and cry raised by Smt. Sarla Devi and Guddi, Girish fired commanding them not to come forward and all the three accused then ran away towards left, Sustaining fatal injuries at his head and eye Rameshwar Dayal died on the spot instantaneously. Thereafter on reaching of some of the co-villagers near the dead body she went to the village and got the report scribed by Deep Chand and then went on foot to the police station Shumshabad situate at a distance of some 7 miles from the village. The police prepared check report on the basis of the written report handed over to the Head Mohafir at the police station who also made entry regarding registration of the crime in GD. Investigation of the crime was entrusted to SI Ram Lakhan Tripathi Who went on the spot and drew inquest proceedings on the dead body of Rameshwar Dayal and prepared the inquest report (Ext ka 10) and other necessary papers (Ext ka 11 to ka 13), He entrusted the dead body in a sealed cover to constable Amar Singh and village chuukidar Bacchan Lal for being taken for its post mortem. Then he picked up four pellets, an empty cartridge of 12 bore and tiklis lying near the dead body and also collected bloodstained and simple earth from the scene of occurrence and prepared their memos (Exts ka 4 and ka 5).

3. Autopsy conducted on dead body of Rameshwar Dayal by Dr. B.B. Bhatnagar, Medical Officer District Hospital, Fatehgarh on 6th of October, 1979 at 4:30 p.m. revealed below noted antemortem injuries:

1. Gun shot wound of entry 3/4" in diameter cavity deep on left eye with margins inverted, direction right to left, charring present around the wound.
2. Gun shot wound of exit 1 1/2" in diameter on left side skull 1" above left ear communicating to injury No. 1 with margins evened.
3. Gun shot would of entry 1/2" in diameter on right side face just in front of right ear brain cavity deep with margins inverted and charring present around the wound, direction from right to left.

4. Gun shot wound of exit 1" In diameter on left side skull 2" above and posteriorly to exit of injury No. 2 with margins everted, communicating to injury No. 3.

On internal examination scalp was found lacerated and right frontal, temporal and left temporal occipital bones were found fractured. Brain was lacerated and lower jaw fractured. Stomach contained semi digested food about 4 oz. Small and large intestine were full of gases and faecal matter.

The doctor opined that death was caused by shock, haemorrhage and coma as a result of ante mortem injuries about one and a half day ago.

4. After completing investigation the police submitted charge sheet against the accused.

5. After framing of charge against the accused the prosecution examined Sarla Devi (PW1) and Guddi (PW2) as eye witnesses of the occurrence. It appears that since genuineness of all the papers was admitted formal witnesses "were not examined by the prosecution.

6. The accused denied the alleged occurrence altogether stating that they were got implicated in the case falsely on account of enmity. They did not adduce any evidence in their defence.

7. On an appraisal of evidence and other material on the record the learned Additional Sessions Judge disbelieved the prosecution case and evidence observing that since Km. Guddi, a child witness could not answer many of the questions put to her, her testimony was not Worthy of credence and also disbelieved the testimony of PW1 Sarla Devi, wife of the deceased observing that in all probability Rarneshwar Dayal was murdered on 5th of October. 1979 at 10:00 p.m. as his stomach contained semi digested food. Thus holding the accused not guilty of the charge levelled against them, he acquitted all the three,

8. Feeling dissatisfied with the impugned judgment this appeal has been filed on behalf of the State assailing acquittal of the accused respondents.

9. We have heard learned AGA Sri K.P. Shukla for the State appellant and Sri P.N. Misru learned counsel for the accused respondents.

10. Learned AGA for the State appellant vehemently argued that since the impugned judgment acquitting the accused of the charge levelled against them suffers from illegality and manifest error in evaluation of evidence and grounds on which order of acquittal is based are unreasonable it can not be sustained in law and hence is liable to be set aside. On the other hand, learned counsel for the respondents contended that the learned trial judge has given cogent and convincing reasons for acquitting the accused the judgment should not be interfered with by this court in appeal.

11. We are conscious of the fact that an appellate court disposing of an appeal from the judgment of acquittal by the trial court though entitled to appreciate the

evidence and come to an independent conclusion, but in doing so the appellate court should consider every aspect on record and reasons given by the trial court in support of the order of acquittal and should interfere only on being satisfied that the view taken by the trial judge is perverse or unreasonable resulting in miscarriage of justice.

12. Learned AGA for the State laid much emphasis upon the fact that trial court was not justified in finding that the FIR was lodged after due consultation and confabulation. This argument advanced by learned AGA has got much force in it. PW 1 Sarla Devi, wife of the deceased and the first informant stated that after the murder of her husband by Virendra, Ram Asrey and Girish she left her daughter there and went to her village where she met her nandoi Deep Chand who scribed the report as dictated by her; that thereafter he read over the report to her and then she put her thumb impression thereon and that then she alongwith her son-in-law Prem Chand went to police station Shamshabad and handed over written report of the occurrence to the police there. A perusal of the check report and GD entry goes to show that the police registered the crime at the police station on the basis of the written report at 4:45 p.m. the same evening and made entry regarding registration of the crime in the GD (Ext Ka 2 & Ka 18), She stated in her examination-in-chief that she got the report scribed by Deep Chand at about 1:00 p.m. She further stated that she alongwith her son-in-law and the village chaukidar reached the police station at about 4:00 p.m. and that subsequently her nandoi Deep Chand also reached there. She also stated that on reaching at the police station she told about the incident to the sub-inspector who met her at the police station. Then in answer to a question put by the defence counsel she replied that after narrating the incident at the police station she lodged the report. However from a few questions and answers the trial judge concluded that the report was scribed by her through Deep Chand at the police station. We have given our anxious consideration to it and we are of the view that hyper technical approach by taking sentences from the evidence out of context from here or there is not proper for reaching a conclusion because it is an unequal duel between a rustic witness and art expert advocate. A perusal of the GD entry goes to show that Sarla Devi accompanied with her son-in-law Prem Chand reached the police station and handed over written report of the occurrence there. There is no mention in the GD entry that when she reached the police station and handed over the written report to the police there she was accompanied with Deep Chand. There is no reason to doubt the genuineness of the GD entry prepared by the police official in the discharge of his official duties unless proved otherwise. A perusal of the FIR goes to show that it is quite natural and spontaneous. PW 1 Sarla Devi, wife of the deceased and the first informant has not been given a suggestion even by the defence counsel in her cross-examination that she got the report scribed after consultation and confabulation with her relatives or the villagers at the police station. We therefore find that the finding given by the trial court that the FIR was ante timed and lodged after due consultation and confabulation is perverse based on

erroneous reading of evidence.

13. The trial judge disbelieved the testimony of PW 2 Guddi, daughter of the deceased aged about 14 years on the ground that she had no idea of directions (east, west, north & south), distance, area etc. He did not administer oath to her observing that she appeared to be aged about 12 years and in his opinion she did not understand sanctity of oath. In our opinion, the trial judge could not jump to this conclusion without recording preliminary questions put to her. PW 2 Guddi stated her age to be 14-15 years. Her mother Smt Sarla Devi (PW 1) had also deposed in her statement that at the time of occurrence Guddi was aged about 14 years and was studying in 4th standard at that time. She also stated that she had a married daughter and admittedly when she went to the police station she was accompanied by her son-in-law Prem Chand and she had a young son namely Pradeep who was in Jail as he was involved in the murder of Sahdev. The trial judge observed that Guddi did not understand the significance of shapath (oath). But he has not recorded the preliminary examination made by him. The trial judge should have put certain questions to the child witness and the answers given by her should have been noted down by him in question answer form and only then he should have recorded his satisfaction. She might not be understanding the significance of shapath but the trial judge should have satisfied himself if she understood the significance of the desirability of speaking the truth. A perusal of her statement goes to show that she had no idea of directions, distance, area etc. She remained silent to some questions put to her such as what was the area of her father's field or whose fields were situate around the field of her father. It is not expected from a girl of 14 years to answer these questions. Besides it, a rustic girl of tender age of 14 years is likely to be overawed by the court atmosphere and the piercing cross-examination made by the defence counsel and out of nervousness she may get confused and may not be able to answer some questions. PW 2 Guddi told the nicknames of all the three assailants and also told that name of Tami was Ram Asrey and that of Gappu Girish but she could not tell the actual name of Buddhu saying that it was slipping her mind. The trial judge while disbelieving her testimony stated that she could not tell the real name of Buddhu. But she state that Ram Asrey and Girish were sons of Bua of Buddhu. As we have already observed above that a girl of tender year of age is likely to be overawed and may get nervous by the court atmosphere seeing it for the first time. But the fact remains that she knew that Ram Asrey @ Tami and Girish (a). Gappu were sons of Butt of accused Buddhu (Virendra). It often happens even with elders that they forget the name of some person at the spur of moment. This was not a ground sufficient by itself for rejecting her testimony. She corroborated the testimony of PW 1 Sarla Devi on all material points deposing that at about 11:00 a.m. the alleged noon when she alongwith her parents returned alter taking bath in river Ganges and they were going towards their house after seeing patavar at their field and reached the field of Raghubar Dayal all the three namely Tami, Gappu and Buddhu armed with countrymate pistols emerged from the field of Chhavinath and Tami shouted

that they should avenge the death of their maternal uncle (Sahdev) and immediately Gappu and Buddhu caught hold of her father and Tami and Buddhu fired shots at him and sustaining the fatal injuries her father fell down under the mango tree and died then and there. She was subjected to searching and rambling cross-examination but nothing substantial could be elicited to shake her credibility.

14. PW 1 Smt. Sarla Devi, wife of the deceased too was subjected to grueling and searching cross-examination but nothing tangible could be brought on the record to impair her credibility. She stated in her cross examination that accused Buddhu and Tami fired shots at her husband Rameshwar Dayal with country-made pistols keeping the barrel over his skin which stands corroborated from the medical evidence. A perusal of post mortem report goes to show that Autopsy Surgeon mentioned in the post mortem report that around both the antemortem gunshot wounds of entry only charring was present. It has been mentioned in Modi's Medical Jurisprudence and Toxicology 1977 Edition at page 228 that these signs (blackening, scorching etc) may be absent when the weapon is pressed tightly against the skin of the body. The medical evidence clinchingly lends support to the testimony of PW 1 Sarla Devi. The testimony of PW 1 Sarla Devi stands corroborated by the testimony of PW2 Guddi on all material points. Both of them appeared to be truthful and straightforward witnesses as they had given honest account of the occurrence witnessed by them.

15. The trial judge also observed that there are some contradictions in the statements of PW 1 Sarla Devi and PW 2 Guddi as PW 1 Sarla Devi stated that at that time there was bajra and jwar crop standing in her field whereas PW2 Guddi stated that at that time there was no crop in her field except pataar. It may be mentioned here that statements of both the eye witnesses were recorded in the court after two years of the occurrence. Minor discrepancies on trivial matters not touching the core of the case should be ignored as they are not going to the very root of the case which may entail rejection of the sworn testimony of two eye witnesses.

16. As far as motive is concerned, the accused had motive to commit the murder of Rameshwar Dayal. Sahdev and Het Ram were real brothers, and Ram Asrey and Girish are the sons of their real sister. PW1 Sarla Devi deposed that Pyarey Lal had executed sale deed of his property in the name of her son Pradeep; that subsequently Sahdev and Het Ram got the deed of will of that very property executed in their favour by their maternal uncle Pyarey Lal and therefore litigation was going on over that property and that proceedings under Sections 107 and 117 of the Code of Criminal Procedure were also going on between her husband Rameshwar Dayal on one hand and Hetram and Sahdev on the other. Some three months prior to the murder of Rameshwar Dayal, Sahdev was murdered, and Pradeep, son of the deceased and Jaidev and Rakesh, brothers of Sarla Devi were facing trial for the murder of Sahdev. Rameshwar Dayal must be doing Pairvi for his son in that murder case. Thus the accused respondents had

sufficient motive to commit murder of Rameshwar Dayal.

17. The learned trial judge also observed that Rameshwar Dayal was murdered on 4th of October, 1979 round about 10:00 p.m. because the doctor who conducted autopsy on the dead body of Rameshwar Dayal mentioned in the post mortem report that stomach contained semi digested food 4 oz and PW 1 Sarla Devi stated in her cross-examination that her husband had taken food last evening, On the basis of the said fact the trial judge concluded that since Rameshwar Dayal had taken food last evening at about 6-7 p.m. and 4 oz of undigested food was found in his stomach he would have been murdered on 4th of October, 1979 at about 10:00 p.m. This observation made by the trial judge is wholly erroneous. Both the eye witnesses categorically stated that Rameshwar Dayal was murdered while returning to the village after taking " bath in the river Ganges as there was purnmast that day, No doubt, PW1 Sarla, Devi, wife of the deceased stated that they had not taken anything that fateful day since morning. However the possibility cannot be ruled out that Rameshwar Dayal might have taken something after taking bath in the morning and Sarla Devi might not have noticed the same. Moreover, the doctor conducting autopsy on the dead body on 6th of October, 1979 at 4:30 p.m. mentioned therein that rigor mortis had passed through upper extremities and was present in lower extremities. It is mentioned at page 125 of Modi's Medical Jurisprudence and Toxicology Edition 1977 that in general rigor mortis sets in 1 to 2 hours after death, is Well developed from head to foot in about 12 hours, is maintained for about 12 hours and passes off in about 12 hours. In the instant case rigor mortis was present in lower extremities at the time autopsy was conducted on the dead body after 30 hours. As, according to ocular testimony Rameshwar Dayal was murdered on 5th of October, 1979 at about 10:00 a.m. and the doctor conducted autopsy on the dead body next day at 4:30 p.m. after 30 hours of death rigor mortis was found present in lower extremities. Had he died on 4th of October, 1979 at about 10:00 p.m. or so rigor mortis would have passed off from the dead body completely at the time of autopsy. Thus the ocular testimony that he was murdered on 5th of October, 1979 at about 10:00 a.m. stands corroborated from the medical evidence.

18. Thus medical evidence leave no room for doubt as to the factum of the occurrence and the prosecution case with regard to its time, and the weapons used in the assault also receives corroboration from it The place of occurrence is also fixed up by recovery of blood, pellets, tiklis and empty cartridge from that place.

19. It is true that both the eye witnesses are closely related to the deceased being his wife and the daughter but the mere fact of close relationship far from being the foundation of criticism of the evidence guarantees the truth of their deposition tested through cross-examination and in conformity with medical evidence.

20. For the foregoing reasons, the impugned judgment cannot be sustained in

law as it is based on faulty and erroneous appreciation of evidence resulting in miscarriage of justice. Since accused respondent Girish @ Gappu was assigned the role of catching hold and he did not cause any injury to the victim he is given benefit of doubt and is, therefore, entitled to acquittal.

21. The Government appeal is allowed in part to the extent that acquittal of accused respondents Virendra @ Budtlhu and Ram Asrey @ Taml u/s 302 read with Section 34 IPC is hereby set aside. Both of them are convicted u/s 302 read with Section 34 IPC and each of them is sentenced to imprisonment for life thereunder. Acquittal of accused Girish @ Gappu is hereby affirmed. He is on bail. His bail bonds are hereby discharged.

22. Accused respondents Virendra @ Buddhu and Ram Asrey @ Tumi convicted u/s 302 read with Section 34 IPC and sentenced to imprisonment for life thereunder are on bail. Their bail is cancelled. Chief Judicial Magistrate Farrukhabad is directed to get them arrested and sent to jail to serve out the sentence imposed upon each of them.

23. Let the judgment be certified to the court below. Record of the case be transmitted to the court concerned immediately for necessary compliance under intimation to this court within two months from the date of receipt of copy of the judgment.