(2004) 09 AHC CK 0071

Allahabad High Court

Case No: Criminal Appeal No. 2668 of 1981

Ram Sajeevan and Others (in Jail)		APPELLANT
	Vs	
State of U.P.		RESPONDENT

Date of Decision: Sept. 24, 2004

Acts Referred:

- Penal Code, 1860 (IPC) - Section 147, 148, 149, 302, 323

Citation: (2005) 1 ACR 362

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

Bench: Division Bench

Advocate: R.B. Sahai, Satish Trivedi, A.S. Diwekar and B.S. Rathore, for the Appellant; S.S. Malik, A.G.A., for the Respondent

Judgement

M.C. Jain, J.

The Appellants, namely, Ram Sajeevan, Ram Kishore, Hem Chand and his father Daya Shanker challenge the judgment and order dated 31.10.1981, passed by Sri L. S. Shukla, the then v. Ith Additional Sessions Judge, Fatehpur in S.T. No. 204 of 1979. All of them have been convicted u/s 302 read with Section 149, I.P.C. and sentenced to life imprisonment. Ram Sajeevan and Daya Shanker have further been convicted u/s 147, I.P.C. with one year"s rigorous imprisonment. The remaining two Ram Kishore and Hem Chand have been convicted u/s 148, I.P.C. with 1-1/2 years" rigorous imprisonment. Ram Sajeevan has also been convicted u/s 323 read with Section 149, I.P.C. and sentenced to nine months" rigorous imprisonment. One Chandra Pal was also tried with the accused-Appellants but he was acquitted. There was another accused Bansh Gopal who had died during the trial.

2. A co-accused Lalji was also convicted and sentenced for various terms. He filed separate Criminal Appeal No. 2609 of 1981. He died during the pendency of appeal and that appeal abated under order dated 14.7.2004.

3. One Shambhoo Dayal died in the incident and Om Prakash P.W. 4 son of deceased Shambhoo Dayal sustained injuries. The incident took place in between the night dated 24/25.3.1979 at about 1 O''clock at the chabutara outside the house of the deceased in village-Godaha hamlet of Chandpur, Police Station Chandpur, district Fatehpur and report was lodged on 25.3.1979 at 3.30 a.m. by Mewa Lal P.W. 3, brother of the deceased.

4. The case of the prosecution as unfolded during the trial was as follows:

The complainant Mewa Lal P.W. 3 and his two brothers-Shambhoo Dayal deceased and Moti Lal lived in the same house. Ram Sajeevan had taken forcible possession over 24 biswa of his land due to which there was long-standing enmity. The complainant''s side had taken back possession over the said land which annoyed Ram Sajeevan. 2-3 days before the incident, Ram Sajeevan''s bullock had hurt Manju-daughter of the brother of the complainant. The complainant and his brothers complained to Ram Sajeevan in this behalf. It further infuriated Ram Sajeevan who, in turn, retorted in abusive language and held out that he would see them soon. In the fateful night, the complainant and his brother Moti Lal were lying inside the room. The deceased Shambhoo Dayal and his sons Om Prakash and Indrajeet were sleeping on the chabutara outside on separate cots. The glowing lantern was hung on a peg in the verandah as usual. At about 1 O''clock, the accused persons named above came to his door. Ram Sajeevan, Daya Shanker, Bansh Gopal and Lalji were armed with lathis. Ram Kishore and Hem Chand had guns with them and Chandra Pal was having a country-made pistol. They caught hold of Shambhoo Dayal and started assaulting him with lathis. While doing so, they kept on asking about the complainant and Moti Lal. On his declining to give required information, they dragged him to the door where the accused Ram Kishore and Hem Chand caused him injuries with fire-arms upon the exhortation of Ram Sajeevan. Sustaining fire-arm injuries, Shambhoo Dayal fell down and died. They also assaulted Shambhoo Dayal''s son Om Prakash with lathis. The complainant and Ors. raised alarm. As a result, Ram Prakash, Babul Lal and many other persons of the village rushed up to the spot on hearing the sound of the gunshots. Upon the pressure of the villagers building up, the accused-persons ran away.

5. The complainant Mewa Lal scribed the report of the incident, went to the police station and lodged the same. A case was registered and investigation was taken up by S.I. R. P. Tripathi P.W. 6. After recording the statements of the complainant Mews Lal and Om Prakash at the police station, he sent the injured Om Prakash to P.H.C., Amauli, district Fatehpur through a constable. He himself proceeded to the spot with other police personnel. Inquest of the dead body of the deceased Shambhoo Dayal was prepared and the dead body was sent for post-mortem which was conducted by Dr. J. S. Rai P.W. 2 on 26.3.1979 at 2.00 p.m. The deceased was aged about 44 years and about 1-1/2 day had passed since he died. The following ante-mortem injuries were found on the person of deceased Shambhoo Dayal:

(1) Gun shot wound of entrance 1" x 1" just back to the ear left. Hair singing. Blackening present. Margins inverted, lacerated cavity deep upward, backward from left to right.

(2) Gun shot wounds of exit four in number each 1/2" x 1/2" x cavity deep in area 2-1/2" x 2" on right side of back part of head 2" back to right ear. Margins everted lacerated. Injury Nos. 1 and 2 are intercommunicating. Two big shot and one wadding piece found. No blackening.

(3) Gun shot wound of entrance 1" x 1" x muscle deep on outer and middle part of the left arm. Blackening and tattooing present. Margins inverted, lacerated, downwards 3" above the left elbow joint.

(4) Gun shot wound of exit area 3" x 2-1/2" x muscle deep on the inner and middle part of left arm. No blackening. No tattooing seen.

(5) Gun shot wound of re-entrance of the shot inside of left side of chest in an area 3-1/2" x 3". Multiple shot each small 1/10" x 1/10". Few are fixed together. Few are separate. Few are skin deep. Few are superficial. Margin inverted, lacerated. No blackening. No tattooing seen. 23 (twenty-three) small shots recovered in injury No. 4.

(6) Abrasion 1/2" x 1/2" back of upper chest on spine of left scapula.

(7) Contusion 2" x 1" back of left chest 3-1/2 below injury No. 6.

(8) Abrasion 2" x 1-1/2" back of left abdomen, 5" below injury No. 7.

(9) Abrasion 1/2" x 1/4" back of left abdomen, 2-1/2" below injury No. 8.

(10) Abrasion 1-1/2" x 1/2" back of abdomen, 2" above left iliac bone.

6. The cause of death was shock and haemorrhage as a result of ante-mortem injuries.

7. The injuries of Om Prakash were examined by Dr. K. C. Gupta P.W. 1 on 25.3.1979 at 7.30 a.m. The following injuries were found on his person:

(1) Contusion on the right side of chest, 5" below and lateral from right nipple, 1-1/2" x 1-1/2" in size, bluish red in colour.

(2) Contusion on the left scapular region, 2" x 1/2" in size, reddish in colour.

(3) Contusion on the left upper arm 4" x 1/4" in size, reddish in colour.

(4) Abrasion on the left forearm 1/4" x 1/4" in size, clotted blood.

(5) Contusion on the right glutial region 3" x 1/2" in size, reddish in colour.

8. All the injuries were simple caused by blunt object and they were about 1/4 day old.

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

10. The prosecution in all examined six witnesses including doctors and Investigating Officer. The witnesses of fact were Mewa Lal P.W. 3 and Om Prakash injured P.W. 4. The accused also examined Hem Nath and Bansh Lal as D.W. 1 and D.W. 2 respectively in defence. Giving Chandra Pal benefit of doubt, trial Judge convicted the remaining accused-Appellants believing the prosecution case.

11. We have heard Sri Satish Trivedi, learned Counsel senior advocate on behalf of the accused-Appellants and the A.G.A. Sri S. S. Malik from the side of State in opposition.

12. The submissions from the side of the Appellants are that it was a dark night and there was no source of light and that actually it was an incident of dacoity in which the accused-Appellants had been falsely implicated by the so-called eye-witnesses due to enmity. The learned A.G.A., on the other hand, has supported the impugned judgment of conviction recorded by the lower court, arguing that the eye-witness account rendered by Mewa Lal P.W. 3 and Om Prakash P.W. 4 (injured) is trustworthy and consistent in harmony with medical evidence. It has also been urged by him that there being sufficient light on the spot and the accused-Appellants being known to the witnesses from before being residents of the same village, there could be no question of mistaken identity. He also countered the argument of the learned Counsel for the accused-Appellants of their false implication owing to enmity.

13. We intend to deal with salient features of these respective contentions in the succeeding discussion in the light of evidence and attending circumstances emerging on record. It admits of no doubt that the deceased Shambhoo Dayal died of gunshot injuries and further that he also suffered injuries of blunt object capable of being caused by lathis. It is crystal clear from the perusal of post-mortem report, outcome of which has been reproduced earlier. It is equally beyond question that Om Prakash P.W. 4 injured was also the object of assault of blunt force inasmuch as he sustained as many as 5 injuries in the form of contusions and abrasions as per his injury report Ex. Ka-1 which, too, has been dealt with above. As a matter of fact, the happening is not denied from the accused-Appellants'' side either, though their contention is that it was an incident of dacoity at the hands of unknown persons and they have been implicated owing to enmity. The happening at the house of the complainant that night is rather fortified by the testimonial assertions of Hem Nath D.W. 1 and Bansh Lal D.W. 2 also.

14. So far as the question of light is concerned, the learned Counsel for the accused-Appellants invited our attention to the revelation made by Om Prakash P.W. 4 in his cross-examination that it was a dark night. But it should be pointed out that the factum of it being dark night does not obliterate the artificial light in the form of lantern as deposed by the two eye-witnesses. The Investigating Officer, R. P. Tripathi P.W. 6 also stated that on reaching the spot, he had inspected the lantern which was glowing at the spot at the time of the incident and had found the same in working condition. He had even

prepared the fard Ex. Ka-8. The lantern after inspection had been returned to the complainant Mewa Lal P.W. 3. Learned Counsel for the accused-Appellants argued that as recited in the fard of the lantern, its top lid was missing. We do not think that the absence of the top lid of the lantern could be a hindrance in emission of light of the flame all-around. To say in simple words, the absence of top lid of the lantern was in no way to affect its usefulness and efficacy. It is common knowledge that many kerosene lamps have no lid at the top over the glass chimney.

15. The learned Counsel for the accused-Appellants argued that the Investigating Officer did not notice any blackening of flame of the lantern on the wall where it was hung. The argument is somewhat self-defeating. There being no top lid over the chimney, the smoke of the flame would have been going straight towards sky, it being an open place.

16. It is also important to note that a few years before this incident, in March, 1974, a dacoity had been committed at the house of the complainant. Judged in this perspective, it was quite natural that a glowing lantern was kept hanging on the peg in the verandah outside the room to guard against any untoward incident, particularly when three persons including Shambhoo Dayal were sleeping on the open chabutara outside the house. Therefore, it is perfectly believable that despite it being a dark night, the lantern was kept glowing on the chabutara which was emitting sufficient light as deposed by the eye-witnesses.

17. Moreover, there was another source of light as stated by Om Prakash P.W. 4. His statement is that the culprits had also torches which they were flashing at the time of the incident. Indeed, they could not operate in pitched darkness and it is believable that they had torches which they were using to accomplish their mission. Naturally, the light of the torches flashed by them was also available to the witnesses at the scene of the incident.

18. To revert to the point under discussion, the lantern was glowing at the chabutara where the incident took place and as noted earlier. Om Prakash P.W. 4 himself was an injured. The light being available near the scene of incident, it was also helpful to Mewa Lal P.W. 3 to witness the incident from inside the room where he was with his another brother Moti Lal. He explained that the eastern door of the room had been torn by the dacoits in the dacoity which took place a few years before the incident. The said eastern door was closed with perforated brick wall. In the northern side there was a door as well as a window and he witnessed the incident from the northern window of the room as well as through perforations in the brick wall in the eastern side. Mewa Lal P.W. 3 was the informant who lodged the report at 3.30 a.m. in the night of incident itself, the occurrence having taken place at 1 O''clock in the night. He and Om Prakash P.W. 4 were the most natural witnesses of the incident. Om Prakash P.W. 4 being himself injured, his testimony carries great weight. So, the finding of the trial court regarding the availability of sufficient light to the witnesses at the spot is supported by satisfactory evidence of the two eye-witnesses and the other relevant circumstances that a few years of the incident, a dacoity had taken place at the house of the complainant. Therefore, it was quite apt for

the inmates of the house to keep artificial light in the night, more so when three family members were sleeping on the chabutara in the open.

19. Let us now deal with this submission of learned Counsel for the accused-Appellants that actually it was an incident of dacoity which was given a twist by the prosecution witnesses to implicate the accused-Appellants. It is significant to observe that no sign of ransacking of the house was found by the Investigating Officer at the spot. A suggestion was made to Om Prakash P.W. 4 that it was an incident of dacoity in which his father was killed. He refuted this suggestion. The defence examined Hem Nath D.W. 1 and Bansh Lal D.W. 2 to say that a dacoity had taken place at the house of the complainant in which Shambhoo Dayal was killed. Hem Nath D.W. 1 claimed that his khalihan was situated at the distance of 20 hands from the house of the complainant Mewa Lal. In the fateful night, he was present in his khalihan. There was a lot of commotion and shouts with firing and none of the village was amongst the culprits. Bansh Lal D.W. 2 stated that his khalihan was in the northern side of the house of Mewa Lal-complainant at a distance of about 20-25 paces. According to him, a dacoity was committed in the house of the complainant in darkness. On shouts, he and 30-40 persons of the Mukundipur with guns had reached at the spot, opening shots and there were 11-12 desperadoes, but none of them was of village Godaha.

20. There could hardly be any reason or purpose for the complainant to reduce the gravity of the offence and to conceal the factum of dacoity. The defence case of dacoity is wholly without foundation and a desperate attempt to cause ripple in the prosecution version of the incident proved by the trustworthy and convincing evidence of two natural eye-witnesses out of whom one is even injured of the felony. Hem Nath D.W. 1 and Bansh Lal D.W. 2 seem to be the birds of the same feather. Hem Nath D.W. 1 for the first time spoke about the occurrence in the Court on 25.9.1981 in spite of his admission that the Investigating Officer had reached the spot after the occurrence in his presence and had remained there for quite considerable time. Bansh Lal D.W. 2 admitted before the Court that he was present in the Court (on 25.9.1981) even when Hem Nath was examined as D.W. 1. It shows his over-interestedness to back the accused. He stated that on 25.9.1981 (when Hem Nath D.W. 1 was examined) and on 13.10.1981 when he himself was examined before the Court, Hem Chand accused fetched him. He came at his behest without any summons of the Court. He admitted in his cross-examination that when shots were being fired, he concealed himself in his khalihan and did not come out till the incident was over. It is not possible to place reliance on the testimony of Hem Nath D.W. 1 and Bansh Lal D.W. 2 that it was an incident of dacoity and on their negative evidence that none of the accused-Appellants participated in the commission of this crime.

21. Now comes the most important question as to what extent the two eye-witnesses, namely, Mews Lal P.W. 3 and Om Prakash P.W. 4 could safely be relied upon. To put it differently, it has to be ascertained as to whether their testimony is capable of being believed against four surviving accused-Appellants or only against some of them. It would

be recalled that the injured Om Prakash P.W. 4 sustained a number of blunt object injuries and the deceased Shambhoo Dayal also sustained a number of such injuries apart from three gun shot wounds of entry and two of exit. Ante-mortem injury No. 2 was the gunshot wound of exit corresponding to that of entry-injury No. 1. The gunshot wound Nos. 3 and 5 were also of entry whereas four was of exit. Dr. J. S. Rai P.W. 2 who conducted autopsy stated that injury Nos. 3, 4 and 5 could be of one gunshot also. Therefore, as per medical evidence, at least two shots were fired on the deceased and the testimony of the two eye-witnesses is to the effect that gunshots had been fired by Hem Chand and Ram Kishore accused-Appellants. Having regard to the injuries of the injured and the deceased and the way in which the incident occurred, the culprits were not less than five. But the point for consideration, as we observed, is as to what extent the two eye-witnesses could safely be relied upon against the Appellants.

22. So far as the shooting of the deceased by the accused Ram Kishore and Hem Chand is concerned, the consistent testimony of these the two witnesses which is in harmony with medical evidence is worthy of belief that the shots had been fired by Hem Chand and Ram Kishore. The additional reason to inspire confidence in their testimony against these two persons is that they could not show any enmity with them or their family members against any of them directly.

23. However, element of doubt persists as to the participation in the crime of two other surviving accused-Appellants Ram Sajeevan and Daya Shanker because of the deep-seated enmity between them and witnesses as has come to surface. No doubt, culprits were five or more including the shooters Ram Kishore and Hem Chand but the participation of Ram Sajeevan and Daya Shanker is not free from reasonable doubt. Admittedly, the dacoity had taken place at the house of the complainant Mewa Lal a few years before this incident. Om Prakash P.W. 4 stated in the opening part of his testimony that his family had long standing enmity with Ram Sajeevan over agricultural land. He further stated that Ram Sajeevan and Lalji were involved in the dacoity at his house which took place in March, 1974. According to him, it could not be ascertained in the beginning due to which no body could be named in the F.I.R. Later on, the Investigating Officer had arrested and taken them to the police station in connection with the dacoity case. It is also there in the testimony of Mewa Lal P.W. 3 that 24 biswa of agricultural land was in his name which Ram Sajeevan had possessed forcibly. Before consolidation, he had taken forcible possession over that land. Though Ram Sajeevan is the uncle of accused Ram Kishore, but no direct enmity could be shown by the defence between Ram Kishore and family members of the complainant. It has also come from the testimony of Mewa Lal P.W. 3 that Ram Lal was the uncle of the accused Daya Shanker. Though Daya Shanker is the father of the accused Hem Chand but there was no direct enmity or bad blood between Hem Chand and the family of the complainant. The situation was different so far as Daya Shanker himself was concerned. Ram Lal (uncle of Daya Shanker) was murdered and Daya Shanker was accused in that case. Mewa Lal P.W. 3 had appeared as prosecution witness against Daya Shanker in the case of murder of

Ram Lal, but that case resulted in acquittal. Raghubeer was the son of Ram Lal. Raghubeer was also murdered. For his murder also, Daya Shanker and Bansh Gopal were accused. In that case also, Mewa Lal P.W. 3 was a prosecution witness. In connection with that case, Daya Shanker and Bansh Gopal were convicted for some offence and were awarded two years" rigorous imprisonment. Not only this, one Ramadhin was also co-accused with Daya Shanker in the case of murder of Ram Lal. When he was released on bail, he was murdered. For the murder of Ramadhin, Mewa Lal P.W. 3, his brother Shambhoo Dayal and Gurdayal were prosecuted. Ram Sajeevan"s father Mahgoo was witness in that case of murder of Ramadhin against Mewa Lal P.W. 3, Shambhoo Dayal deceased and Gurdayal who were acquitted by the Court of Sessions. This background clearly indicates deep seated enmity between prosecution witnesses and their family on the one hand and the accused Ram Sajeevan and Daya Shanker on the other, who allegedly wielded lathis. At times, the prosecution witnesses make capital of actual incident to implicate their staunch enemies along with real culprits. The possibility cannot be ruled out that actuated by the instinct of vengeance, the accused-Appellants Daya Shanker and Ram Sajeevan had been implicated by the two eye-witnesses along with the real culprits Ram Kishore and Hem Chand who gunned down Shambhoo Dayal along with a few unknown Ors. armed with lathis. The lathi wielding unknown culprits, who were at least three, caused injuries to the deceased as well as to injured Om Prakash P.W. 4. Since the real incident had taken place in which Ram Kishore and Hem Chand had played potent role of shooting dead Shambhoo Dayal, the likelihood is there that two eye-witneses thought to implicate their enemies, Ram Sajeevan and Daya Shanker also.

24. It is primary principle of criminal law that accused "must" and not merely "may be" guilty before a Court can convict him. The mental distinction between "may be" and "must be" is long and divides vague conjectures from true meaning. If an innocent person is convicted, the scars left by the miscarriage of justice cannot be erased by any subsequent act. A person should not be convicted of an offence which is not established by the evidentiary standard of proof beyond reasonable doubt. In respect of the participation of the accused Ram Sajeevan and Daya Shanker in the crime at hand, the actual and substantial doubts arise from the testimony of Mewa Lal P.W. 3 and Om Prakash P.W. 4 owing to deep-seated enmity between them and their family on the one hand and these two on the other. For these reasons, it would not be safe to rely on the testimony of eye-witnesses as against accused-Appellants Ram Sajeevan and Daya Shanker.

25. It is, however, made clear that the fact that the testimony of two eye-witnesses is not being accepted as against these two accused-persons does not mean that they are telling lie but the situation is that having regard to the deep seated enmity between them and prosecution side, the testimony of the two eye-witnesses against them is found to be of doubtful nature and character and for this reason it is not accepted against them. There is difference between "doubtful" and "falsehood". The eye-witnesses are being disbelieved

as against these two as their participation in the crime is doubtful. They are not disbelieved against them because their testimony against them is false. The benefit of the fact that the testimony of these two eye-witnesses, keeping in view the earlier background of hostility between them and prosecution side, is found doubtful against them, would go to them and not to accused-Appellants Ram Kishore and Hem Chand against whom the testimony is firm and trustworthy without any blemish that as members of unlawful assembly they shot dead Shambhoo Dayal in prosecution of common object of the unlawful assembly, playing potent role. It is of great importance that the two prosecution witnesses or their family members did not have any direct animosity against any of them.

26. In the result, we partly allow this appeal. The conviction and sentences passed against accused-Appellants Ram Sajeevan and Daya Shanker are set aside and they are acquitted. The appeal concerning the accused-Appellants Ram Kishore and Hem Chand is dismissed and their conviction and sentences as passed by the lower court are affirmed. Both of them shall undergo life imprisonment u/s 302, I.P.C. read with Section 149, I.P.C. and 1-1/2 years rigorous imprisonment u/s 148, I.P.C. The sentences shall run concurrently. They are on bail. The Chief Judicial Magistrate, Fatehpur, is directed to cause them to be arrested and lodged in jail to serve out the sentences passed against them.

27. Let a copy of this judgment along with record of the case be immediately sent to the court below for needful compliance under intimation to this Court within two months from the date of receipt.