
(1994) 01 AHC CK 0060

Allahabad High Court (Lucknow Bench)

Case No: Criminal Appeal No. 622 of 1979;

Remesh Bux and Anr.

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: Jan. 28, 1994

Acts Referred:

- Penal Code, 1860 (IPC) - Section 201, 302

Hon'ble Judges: Vishnu Sahai, J and R.K.Agrawal, J

Final Decision: Allowed

Judgement

V. Sahai, J.

1. The appellants Ramesh Bux and Asghar Ali were convicted under Sections 302/201 and 404, Indian Penal Code and were sentenced to Life Imprisonment, four year"s R. I. and three year"s R. I. respectively. The sentences were directed to run concurrently. The aforesaid order was passed by Sri S. D. Rai Vltth Additional District and Sessions Judge, Barabanki in Sessions Trial No. 51 of 1978. Feeling aggrieved by their aforesaid convictions and sentences the appellants have come up in appeal before this Court.

2. The prosecution case in brief, as contained in the F.I.R. lodged by Smt. Chamela wife of deceased Ram Lakhan Varma on 1421974 at 8.05 AM. at Police Station Mawai, District Barabanki the distance between the place of the incident and the aforesaid police station being three miles, is an under.

3. The informant claims to be a resident of village Lodh Purwa hamlet of Amiha, Police Station Mawai, District Barabanki. According to her, between her husband Ram Lakhan Varma on one side and coaccused Mathura Prasad, Mahraj Bux and Ramesh who are said to be sons of aforesaid Mathura, on the other, a quarrel took place about three years ago because the latter had made a false F.I.R. pertaining to theft against Ram Lakhan verma. It is alleged that the aforesaid persons had picked up Bhoosa of the deceased. For sometime Ram Lakhan Varma and the accused persons were not even on talking

terms, but recently they started coming to the informant's house. On Saturday night at about 9 P.M. appellant Ramesh is alleged to have taken the deceased to his house and ever since then the deceased did not return. In the morning, the informant inquired but was told that in night the deceased had gone back home. When till Monday the deceased did not return, the informant sent some people in relationship to enquire about him. It is alleged that coaccused Chedi Kurmi told the informant that a corpse was lying in Raghunath Kurmi's field situate to the west of the village. Nervously the informant went and discovered that corpse to be that of her husband. Her husband is alleged to have been carrying Rs. 800/- in his coat but that was missing. It is also alleged that Sant Bux Kurmi, Badal Kurmi, Mata Prasad Kurmi and Ram Saran Kurmi saw her husband Ram Lakhan Varma with Ramesh, Mathura Prasad and Mahraj Bux going towards west of the village. It is also alleged that covillagers Bechu Lal Kurmi and Dularey Chamar also saw Mathura Prasad, Mahraj Bux and Ramesh with Ram Lakhan Varma. It is further alleged that Pancham Kurmi and Gaya Prasad Kurmi saw Mathura, Mahraj Bux and Ramesh returning towards their house. It is stated in the F.I.R. that Mathura Prasad, his sons Mahraj Bux and Ramesh after killing her husband, severed the head from the body. The informant alongwith the Chaukidar went to Police Station Mawai and lodged the F.I.R. in which the facts enumerated above are mentioned.

4. The F.I.R. had been lodged in the presence of the Station Officer of Police Station Mawai (P.W.9) Ved Prakash Singh. He took the investigation of the case in his hands. After recording statements under Section 161 Cr. P.C. etc. preparing the inquest, site plan and challan lash and sending the corpse for autopsy, he started searching the accused, On 19/2/1974 he arrested appellant Asghar Ali, Ramesh, Mathura and Mahraj Bux. At the pointing out of Mathura (Mathura died during the course of trial), he recovered blood stained Gandasa which was concealed in Khar lying to the north of Mathura's house. Ex. Ka1 is said to be a recovery memo of the aforesaid Gandasa. Thereafter the same day at the pointing out of appellant Ramesh and Mahraj Bux (Mahraj Bux died before committal of the case) he recovered bloodstained clothes which had been concealed by the aforesaid persons in a pit behind their house. Ex. Ka2 is the recovery memo of the aforesaid clothes. At the pointing out of appellant Asghar Ali, the Investigating Officer discovered the place of the incident and from there recovered the jaw, the teeth, watch and some coins which are alleged to belong to the deceased. He is also alleged to have recovered plain and bloodstained earth. The Investigating Officer sent the Gandasa, bloodstained clothes of the accused, bloodstained earth etc. to the Chemical Examiner whose report is that the aforesaid items contained blood. Strangely enough since there is not report of the Serologist obviously it cannot be said as to whether the blood found was human or not. Two autopsies of the dead body of the deceased Ram Lakhan Varma; one pertaining to his body and one pertaining to his head were conducted by Dr. K. K. Agarwal (P.W.7) On the body of the deceased, the Doctor found four incised wounds and on the head of the deceased seven incised wounds and one injury namely injury No. 6, which has been described by him as left ear hanging with a tag of skin.

5. The case was committed to the Court of Sessions against Mathura Prasad and the appellants. As stated earlier, during trial in the Court of Sessions, Mathura Prasad died. Thus only two persons namely, the appellants were convicted and sentenced. The appellants Ramesh and Asghar Ali were charged under Section 302 I.P.C. and in the alternative under Section 302 read with Section 34 I.P.C. They were further charged under Section 201, I.P.C. and under Section 379 I.P.C. and in the alternative under Section 404 I.P.C. The accused pleaded not guilty to the charges levelled against them and claimed to be tried. Their defence was that they have been falsely implicated in the instant case by the witnesses who were associates of the deceased Ram Lakhan Varma. Both the appellants denied that any recoveries were made at their pointing out.

6. During trial prosecution adduced circumstantial evidence against the appellants. The circumstances which the prosecution adduced during trial against the appellants were (a) motive, (b) deceased being last seen with the appellants and (c) evidence under Section 27, Evidence Act in the form of recoveries.

7. At the very outset we may point out that the law on circumstantial evidence is well settled through a catena of decisions of the Apex Court as well as of this Court. In cases of circumstantial evidence, the prosecution has to prove (1) the various circumstances beyond reasonable doubt; (2) that collectively the various circumstances unerringly lead to the conclusion of the guilt of the accused; and (3) the circumstances proved are wholly incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis. To put it in the timehonoured way the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis. The obvious question which arises for determination in this appeal is as to whether the prosecution has proved beyond doubt the various circumstances; that they collectively and unerringly point out to the guilt of the accused; are wholly inconsistent with the innocence of the accused; and incapable of being explained on any other reasonable hypothesis.

8. We have been taken through the evidence adduced by the prosecution to establish the various circumstances by the learned Counsel for the appellants. After hearing the learned Counsel for appellants, Mr. Nagendra Mohan and the learned Counsel for the State Mr. Anadi Banerji, we are satisfied that the circumstances adduced by the prosecution have not been established beyond reasonable doubt and consequently there can be no question of the prosecution discharging the quantum of burden required in such cases.

9. We would first like to take up the first circumstances adduced by the prosecution namely, motive. The motive alleged by the prosecution is that about three years ago, Ramesh, his brother Mahraj Bux and his father Mathura had lodged a false accusation of theft against the deceased and thereafter they had picked up the Bhoosa belonging to the deceased. It is also alleged by the prosecution that prior to the murder of the deceased, Ramesh, Mahraj Bux and Mathura had started visiting the house of the deceased. When

we examine the above motive, we find that there are two difficulties in our way in accepting it. The first difficulty is that this motive was hardly a motive for the accused to commit this crime. On the converse it was a reason for the informant to falsely implicate the appellants. The second difficulty is that if the accused persons started visiting the house of the deceased prior to his death, it obviously means that no inimical strain between the parties was left and hence there was no question of the accused persons killing the deceased on this score. Another difficulty which weighs with us is in not accepting this motive is that only a solitary witness namely, Smt. Chamela widow of the deceased has deposed about it. No independent evidence has been adduced by the prosecution for proving the motive.

10. The would now like to take up the next circumstance adduced by the prosecution namely that of last seen. At the very outset we may point out that the prosecution in this case is trying to blow hot and cold in the same breath. On one side it alleges that there was enmity between the accused and the deceased and on the other it says that appellant Ramesh had come to the house of the deceased and with him the deceased had gone. In order explain this absurdity the prosecution case is that prior to his death the relations between the deceased and the appellants had become good. We feel this has been deliberately introduced by the prosecution to probablise the fact that appellant Ramesh would come to the house of the deceased and take him with him. Coming to the evidence of last seen, we find that the evidence is that at about 9 P.M. on 921974 appellant Ramesh took the accused from latter"s house and thereafter the deceased did not return. To substantiate the taking away of the deceased from the house of deceased, two inimical witnesses namely, Smt. Chamela the widow of deceased and Sant Bux (P.W.2) have been examined. Sant Bux in Para 7 of his statement admitted that on his land there is name of accused Mathura; that name came after the consolidation operations. He came to know 6 to 7 years ago that Mathura"s name had come on the land. He also admitted that he felt bad because Mathura"s name was entered on that land. He admitted that when he asked Mathura to delete his name, he refused to oblige. In order to dilute the emity in para7, this witness stated that however, on the aforesaid land the possession was of his. We feel that since there is not independent evidence on the taking away of the deceased by Remesh from his house and the story of taking away appears to be extremely improbable, it would not be sate to accept the prosecution case that on 821974 at 9 P.M. appellant Ramesh took the deceased from his house. Consequently, we hold that this part of the prosecution case has not been established by the prosecution. Another piece of evidence pertaining to the circumstance of last seen has been given by witnesses Dularey (P.W. 3) and Bechu (P.W. 4). Both these witnesses are alleged to have seen the accused Mahraj Bux and Mathura as well as the appellants going towards Abadi in the company of Ram Lakhan deceased at about 9.30 P.M. Out of these witnesses, we find that Bechu Lal (P.W. 4) was inimical to the accused. He admitted in paragraph 6 of his statement that 5 to 6 years ago, there was a quarrel between him and Mathura (father of appellant Ramesh) and both sides had lodged F. I. Rs. and the police and initiated proceedings under Section 107 Cr. PC. We find that there

are instances of untruthfulness in his statement. In his statement in the trial Court he stated that he saw the deceased in the company of Mathura, his sons Ramesh (appellant) and Mahraj Bux and Asghar Ali (appellant) standing at the door of Mathura for 2 or 3 minutes. However, he did not mention this to the Investigating Officer in his statement under Section 161 Cr. PC. When confronted as to why he had not stated this to the Investigating Officer, he stated that he could give no reason. Apart from enmity there are some improbabilities in the evidence of Bechu Lal (P.W. 4). Hence we place no reliance on (P.W. 4) Bechu Lal's evidence. The evidence of Dularey (P.W. 3) also does not inspire confidence. Ammusingly enough, he claims that he was the only person in his neighbourhood who was awake at that time and all others had been sleeping. Dularey to us does not appear to be a truthful witness. In his statement under Section 161 Cr. PC. he named Mathura and his sons Ramesh (Appellant) and Mahraj Bux (who died prior to the commencement of the trial). In his statement in the trial Court, he stated that along with the aforesaid persons there was an unknown person whom he did not know from before. When confronted with this conflict, between his statement as contained in Section 161 Cr.P.C. and his statement in the trial Court, he replied that he had told the Investigating Officer about the unknown person also but could not give any reason as to why the Investigating Officer did not incorporate this in his aforesaid statement. In his statement under Section 161 Cr. P.C. he is alleged to have stated that the murder was committed elsewhere and the body was kept at another place. When confronted with the aforesaid statement during trial, he denied to have given the same. In our opinion, a witness who is habitually in the habit of telling lies cannot be believed in a murder case where the minimum sentence is Life Imprisonment. Both (P.W 3) Dularey and (P.W.4) Bechu Lal contradict each other on the time they saw the deceased in the company of appellants and others whereas Bechu (P.W.4) stated that he saw them at 9.30 P.M. Dularey stated that he saw them at 10.11 P.M. For the above reasons we are not prepared to place reliance on the circumstance that on 9/2/74 at about 9.30 P.M. Dularey and Bechu Lal saw Ram Lakhan in the company of the appellants, Mathura and Mahraj Bux.

11. The third set of evidence pertaining to the evidence of last seen is that of witness Pancham (P.W.5) He deposed a purely cock and bull story in his statement in the trial Court. His statement is that at 2.30 A.M. at night he accompanied by Ganga Prasad was going to Flour Mill "Chakki Par Dhan Darane Ja Raha Tha" and when he had reached by the side of the tubewell, he saw appellant Ramesh, Mathura and Mahraj Bux coming. On his asking them as to where they were going, they replied that they were going to Amrahiya. This witness further stated that thereafter the aforesaid three accused persons washed their hands in a Hauz. We find it highly improbable and absurd to believe that on 9th February, at 2.30 A.M. when there was bitter winter, Pancham would have been going for the purpose indicated by him. It is an unhappy coincidence that he had met the accused persons. However, we further find that in his statement under Section 161 Cr. P.C. he had not stated that the accused persons had washed their hands in Hauz. When he was confronted with the aforesaid statement, he replied that he had told the Investigating Officer about this, but could give no reason as to why the latter had not incorporated this

in his statement. In addition to this, we find that he is inimical because his evidence shows that some years before the incident in Tahsil Ram Sanehighat, District Barahanki in a mutation case he had started some proceedings against the collaterals of Mathura. In view of what has been stated above, we are not impressed with his evidence and place no reliance on it.

12. Before coming to the evidence of recovery, we may point out that the prosecution having failed to prove that motive for the crime and the circumstance of last seen, even if it be assumed that the evidence of recovery under Section 27 of the Evidence Act is proved by it, the conviction of the appellants under Section 302 I.P.C. 201 I.P.C. and 404 I.P.C. cannot be sustained. However, in the instant case, there are some weaknesses in the evidence of recovery which renders the prosecution case unworthy of acceptance. We now propose to enumerate those weaknesses. A perusal of the judgment of the learned Additional Sessions Judge shows that he has used the evidence of recovery of Gandasa against the appellants also. We are afraid that this could not be done. The Investigating Officer (P.W.9) S.O. Ved Prakash Singh in para 5 of his statement in the trial Court deposed that a blood stained Gandasa was recovered at the pointing out of coaccused Mathura, who as stated above, died during trial. Since the aforesaid recovery was made only at the pointing out of Mathura, this evidence of recovery of Gandasa cannot be legally used against the present appellants. We may also mention that there is no report of the Serologist on record and consequently, it can not be said beyond reasonable doubt as to whether the blood on Gandasa was human or not. We may further add that the recovery of Gandasa was made from an open place namely, from Puwallying to the north of Mathura's house. In these circumstances the evidence of recovery of Gandasa is of no avail to the prosecution in fixing the guilt of the appellants. Coming to the evidence of recovery of bloodstained clothes of appellant Ramesh and Mahraj Bux at their pointing out from a pit behind their house we find there is no report of the Serologist to show whether the blood was human or not. In a Supreme Court decision reported in 1963 Criminal Law Journal p. 71, Raghao Prapanna Tripathi v. State, it was held that unless it can be established that blood had human origins, mere recovery of bloodstained clothes would be of no avail to the prosecution. In that case too, a shirt was recovered and there was no report of the Serologist to show whether the blood on it was human or not. We may also mention that apart from the Investigating Officer two witnesses namely, (P.W.5) Pancham and (P.W.I) Bhola Nath have also been examined by the prosecution. For the reasons stated earlier (P.W.5) Pancham cannot be said to be either independent witness or a truthful witness. (P.W1) Bhola Nath deposed that when the witnesses had collected just prior to the making of recoveries by Darogo Ji, Daroga Ji said "Yah Muljiman Aap Logon ke samne yah batayenge ki Kaun Kaun Cheej Kahan Rakhi Hai." To use the telling of this fact by Darogaji to the recovery witnesses appears to be something Cookedup and shows that recoveries are a piece of manufactured evidence in this case. There is another infirmity in the evidence of both the recoveries namely, Gandasa and clothes which renders them unworthy of acceptance. To our mind third degree methods were used by the Investigating Officer prior to effecting these

recoveries. In the instant case we find that Mathura, Mahraj Bux and appellant Asghar Ali had injuries on their person. Prosecution explained these injuries on the hypothesis that they were necessary for arresting the accused persons. But the claim of the prosecution is unworthy of acceptance because the injuries found were of a serious nature. They include injuries on scapula on the person of Mahraj Bux and fracture of ulnabone of Mathura. In our opinion these injuries were not caused while arresting the accused persons but were the result of third degree methods which were used for procuring false evidence of recoveries. The injuries of these accused wets examined in the District Jail Barabanki By Dr. J. K. Rai on 2121974 and this has been proved by D. W. 2 Ramesh Chandra, who was Compounder in the aforesaid District Jail hospital and who is familiar with the writing and signatures of Dr. Rai. The evidences is that Dr. Rai is somewhere in Bengal and is not traceable and, therefore, D.W. 2 Ramesh Chandra Sharma proved the injuries.

13. For the reasons stated above, we are not inclined to place any reliance on the evidence of recovery. Mr. Anadi Banerji learned Counsel for the State vehemently urged that the prosecution has established each of the aforesaid circumstances by reliable, trustworthy and unimpeachable evidence. We regret that for the reasons stated above, we are unable to subscribe to this contention of his. Consequently, the appeal succeeds.

14. We allow the appeal of the appellants Ramesh Bux and Asghar Ali and set aside their convictions recorded by the learned trial Court under Sections 302 I.P.C.; 201 I.P.C. and 494 I.P.C. The sentences imposed under the aforesaid sections are also set aside. We are informed that the appellants are on bail. They need not surrender, their bail bonds are cancelled and sureties discharged.