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**(2003) 03 AHC CK 0180**

**Allahabad High Court**

**Case No:** Criminal Appeal No. 1801 of 1981

Paras and Another (in Jail)

APPELLANT

Vs

State of U.P.

RESPONDENT

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**Date of Decision:** March 25, 2003

**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 302, 34

**Citation:** (2003) 2 ACR 1599

**Hon'ble Judges:** M.C. Jain, J; K.N. Ojha, J

**Bench:** Division Bench

**Advocate:** R.B. Sahai, Samit Gopal and G.S. Chaturvedi, for the Appellant; G.S. Bisaria, A.G.A., for the Respondent

**Final Decision:** Partly Allowed

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### **Judgement**

M.C. Jain, J.

The Appellants are Paras and Raj Bahadur who have preferred this appeal against the judgment and order dated 11th August, 1981, passed by Sri D. K. Trivedi, the then v. Ith Additional Sessions Judge, Gorakhpur in Sessions Trial No. 407 of 1980. Raj Bahadur has been convicted u/s 302, I.P.C. and sentenced to life imprisonment, whereas the other one Paras has been convicted u/s 302, I.P.C. read with Section 34, I.P.C. and sentenced to life imprisonment.

2. Salient features of the case may be noted. The incident occurred in between the night of 14/15.10.1979 in village Tilakpur, P.S. Belghat, district Gorakhpur. The F.I.R. was lodged on 15.10.1979 at 6.30 a.m. by oral narration by Sumitra P.W. 1 an eye-witness-daughter of the deceased Rajdei. At the relevant time, Rajdei's husband Ram Bilas was working in Bombay. On the fateful night, she was sleeping in the outer verandah (osara) of her house. Her daughters Sumitra P.W. 1, Sudama P.W. 2 and Asharfa as also her sons Rampher alias Shyamphal P.W. 3 and Ramphal were sleeping nearby. Sumitra woke up on hearing the barking of dogs. She flashed the

torch and saw the two Appellants. Paras exhorted Raj Bahadur to kill Rajdei, Raj Bahadur instantaneously opened fire from his country-made pistol on Smt. Rajdei, who died then and there. The three daughters and sons of Rajdei caught hold of the accused Appellants and made alarm but they managed to extricate themselves and ran away. Later on, several villagers assembled at the scene of occurrence. Consequent upon lodging of the F.I.R. by Sumitra P.W. 1, a case was registered. It was also stated in the F.I.R. that a few days before, an altercation had taken place between the deceased and the Appellant Paras as his she-buffalo had damaged the paddy crop of the deceased. She had abused Paras and he had threatened her of death. The investigation was taken up by Station Officer Ram Ratan Nag P.W. 6.

3. Post-mortem over the dead body of the deceased was conducted on 16.10.1979 at 3.15 p.m. by Dr. I. P. Singh P.W. 7. She was aged about 40 years and the ante mortem injury found on her person was multiple gunshot wounds 2/10" - 2/10" on both the sides of chest including neck in an area of 12" - 8". The cause of death was shock and haemorrhage resulting from this ante mortem injury.

4. The defence was of denial.

5. At the trial, the prosecution examined in all seven witnesses out of whom Sumitra P.W. 1, Sudama P.W. 2 and Rampher alias Shyamphal P.W. 3 were the eye-witnesses. The learned Sessions Judge believed the prosecution evidence and passed the impugned judgment which is assailed in this appeal.

6. We have heard Sri G. S. Chaturvedi, learned Counsel for the Appellants and Sri G. S. Bisaria learned A.G.A. from the side of the State. We have also gone through the record of the case.

7. It has first been argued by the learned Counsel for the Appellants that in the evidence before the Court, Smt. Sumitra P.W. 1 introduced two other motives that 8-10 days before the incident, Raj Bahadur had cut the babool tree of her mother and a quarrel had taken place in this behalf between her mother and Raj Bahadur. She also stated that when her brother was coming from school, Raj Bahadur's brother had snatched his cycle. The submission of Sri Chaturvedi is that these two motives were not given in the F.I.R. It should be pointed out that motive alone is not sufficient to determine the culpability. In the present case, the motive is immaterial otherwise also because of eye-witness account. It has also to be kept in mind that the F.I.R. was lodged by oral narration by an illiterate lady, who had seen the ghastly murder of her mother the previous night. Naturally, she was overwhelmed by grief. Under such circumstances, as to the previous background, she could narrate only what came to her recollection at the spur of the moment. Therefore, the absence of narration of other two motives in the F.I.R. is of no consequence.

8. Learned Counsel for the Appellants then argued that all the three eye-witnesses, namely, Sumitra P.W. 1, Sudama P.W. 2 and Ram Pher alias Shyamphal P.W. 3 are interested persons being the children of the deceased. It has also been urged that

Sumitra P.W. 1 being married daughter of the deceased was ordinarily supposed to be with her husband in his village and not at the place of the incident. As regards Ram Pher alias Shyamphal P.W. 3, the contention is that he was a child witness aged about 9 years and was susceptible to tutoring. It is of significance that the incident took place at about midnight at the house of the deceased when no other independent witness could be expected to be present. We note that as regards the presence of the married daughter of the deceased at the time of the incident, namely, Sumitra P.W. 1, the defence could not dare put any question to her as to why she was present there. It is usual even for married daughters to visit the house of their parents. There was no improbability in her being present at her mother's place. Her statement finds corroboration from that of Sudama P.W. 2 and Ram Pher alias Shyamphal P.W. 3 who are natural witnesses of the incident. No doubt Rampher alias Shyamphal P.W. 3 was child witness but test questions were put before recording his statement. He, too, supported the prosecution story that Raj Bahadur opened fire on his mother. The testimony of three eye-witnesses, whose presence at the place of the incident was natural, is consistent that Raj Bahadur had opened shot on the deceased. The sequence of the incident has to be taken note of that these witnesses woke up on the barking of the pet dog. Smt. Sumitra P.W. 1 instantaneously flashed the torch in the light of which the three witnesses saw the incident. The dog is a sensitive and alert animal. It is very faithful to its master. A pet dog would get alert and raise an alarm on spotting a stranger at odd hour where its master and other members of the family are sleeping. Therefore, it is perfectly believable that on the barking of the pet dog, these witnesses woke up and Sumitra P.W. 1 flashed the torch in the light of which all the three witnesses witnessed the incident.

9. Learned Counsel for the Appellants then urged that Sumitra P.W. 1 stated that the shot had been fired by Raj Bahadur on her mother from a distance of two paces. We have been taken through the statement of Dr. I. P. Singh P.W. 7 that if the shot is fired from a distance of within 5 ft, it produces blackening and charring. According to him, the shot in question must have been fired from over a distance of 6 ft. because there was no blackening and charring. On the basis of the distance of shot spoken by Sumitra P.W. 1, it has been urged that there is conflict between the medical evidence and ocular testimony because no blackening and charring was found. The argument, in our view, is based on too rigid and artificial interpretation of the testimony of Sumitra P.W. 1. We do not see that there is any conflict between the medical evidence and ocular testimony. The distance has been spoken by Sumitra P.W. 1 by rough estimate. Regard has to be had that she is an illiterate lady drawn from rustic fragment of the rural society. One pace is roughly equivalent to 2-1/2 ft. She has also stated that she had seen the accused standing at the door. The Investigating Officer Ram Ratan Nag P.W. 6 stated that the place where the cot of Rajdei was found by him was at a distance of 2-3 paces from the eastern wall of the osara and the door was also at a distance of two paces from the place of the cot.

Thus, it would appear that the distance of Raj Bahadur at the time of shooting was about two paces from the cot of Rajdei who was sleeping on a cot. A cot usually is not less than 6 ft. in length and 4 ft. in width. Therefore, on proper and reasonable interpretation of the statement of Sumitra P.W. 1, the distance of shot must have been a little over 6 ft. and as such, there is nothing unusual if blackening and charring was not found around the wound.

10. The learned Counsel for the Appellants then urged that as per the statement of Ram Pher alias Shyamphal P.W. 3, the torch had been flashed by his sister after the shot had been fired. It appears that this child witness said so under some confusion under the stress of cross-examination. The entire incident occurred in a few seconds. On the barking of pet dog, the witnesses woke ; as a natural impulse Sumitra P.W. 1 flashed her torch ; Raj Bahadur opened shot and the witnesses saw the incident. No benefit can accrue to the accused Appellants on the stray sentence from the testimony of this witness divorced from the rest because this witness also stated that he saw the incident in the light of torch, which was flashed by his sister Sumitra P.W. 1.

11. Learned Counsel for the Appellants then urged that as per the eye-witnesses, the paddy crop had been thrashed and was lying outside and it was for this reason that all of them had slept along with deceased in the osara. The statement of Investigating Officer Ram Ratan Nag P.W. 6 has been referred to that he did not find anything lying in front of the door of the deceased. On his such statement, the testimony of eye-witnesses was challenged that thrashing of paddy crop had taken place which was lying outside. We find that no specific question was put to the Investigating Officer regarding paddy crop being there. It appears that in answer to a rigmarole question he replied that "Mritak ke darvaje ke samne koi chhez nahin rakhi thi. Khali jamin thi". It is not sufficient to discredit the direct evidence of Sumitra P.W. 1 that thrashing was done recently and the crop was lying there. The crop could be by the side, and not just in front of the door. The statement of the Investigating Officer cannot be stretched to mean that thrashed crop was not at all there. We may point out that the statement of Sumitra P.W. 1 regarding thrashing of paddy crop and it being lying there was not even challenged in her cross-examination.

12. On careful consideration, we find the conviction of the Appellant Raj Bahadur to be perfectly sustainable. It was he who fired the single fatal shot on the deceased and cut short her life.

13. Raj Bahadur, who was himself holding a country-made pistol hardly needed any exhortation, inasmuch he had come predetermined and prepared to shoot the deceased. He instantaneously performed the job by opening the shot on the deceased. The participation of Paras in the form of exhortation is doubtful under the circumstances of the present case. Therefore, benefit of doubt should be afforded to the other Appellant Paras. Against him, too, the prosecution has pleaded enmity.

There is human tendency to rope in the adversary to settle a score on the happening of an incident, even if he is not there.

14. We would, therefore, partly allow the appeal.

15. To come to close, we partly allow this appeal. The conviction of Raj Bahadur u/s 302, I.P.C. and his sentence of life imprisonment is maintained. He is on bail and shall be arrested and lodged in jail to serve out the sentence.

16. The conviction and sentence passed against the Appellant Paras is set aside. He is already on bail.

The office shall send a copy of this judgment to the court below along with the record for reporting compliance to this Court within two months.