
(2011) 03 AHC CK 0364

Allahabad High Court

Case No: Criminal Appeal No. 6033 of 2006

Ayub and Another

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: March 3, 2011

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 162, 164, 313
- Evidence Act, 1872 - Section 145, 155, 157, 80
- Penal Code, 1860 (IPC) - Section 302, 307, 34, 394

Citation: (2011) 3 ACR 2594 : (2011) 4 ADJ 314

Hon'ble Judges: N.A. Moonis, J; Amar Saran, J

Bench: Division Bench

Final Decision: Allowed

Judgement

Amar Saran, J.

Heard Sri G.S. Chaturvedi, learned Senior counsel for the Appellants and the learned A.G.A. for the State.

This Criminal Appeal arises from the judgment of the Additional Sessions Judge. Court No. 2, (Special Judge, D.A.A.), Banda, dated 27.9.2006.

2. The prosecution case mentioned in the F.I.R., which was lodged at 9.20 p.m. on 9.8.1991, by Constable Surendra Singh, P.W. 4 at P.S. Tendwari was that the informant and Constable Gopal Yadav were doing picketing duty regarding the movement of trucks at a school situate near Semari Nala. At about 8 p.m., two empty trucks came from the direction of Banda. The informant and Constable Gopal Yadav asked the two trucks to proceed after making a convoy for the sake of security, but the two trucks drivers did not heed the prayer, but kept on proceeding, whilst looking in the direction of the police personnel on duty. The deceased Constable Gopal then approached the truck from the western side and flashed his torch and tried to stop the trucks, but the trucks did not heed his request. The truck

occupants refused to stop the truck. The driver asked the four persons who were sitting in the rear truck to pull the "sala" inside and to kill him. Then they pulled Constable Gopal inside and the truck rapidly rushed towards Tenduwari. The informant and one other Constable chased the truck. About 2 or 3 furlongs away, they found Constable Gopal's corpse lying on the road, where he had been thrown after being murdered. His uniform etc. was torn, but his rifle was missing. The miscreants had fled with his rifle, and the cartridges in its magazine. The truck driver and their companions were said to have been recognized in the cabin light and in the torch light flashed by the witnesses, but because there was slush and mud due to rains, the truck number could not be identified. The informant then proceeded to the police station leaving Gopal in a half dead condition alongwith Home Guard Bhagirath, P.W.1.

3. On the informant's report a case was registered at case crime number 214/91, under Sections 307 and 394 IPC. Mahesh Babu Yadav commenced the investigation of this case. He sent the injured Gopal to Hospital, where he was declared dead. The case was then converted from one u/s 307 to one under 307 302 and 394 IPC. On 10.8.1991, inquest was done on the body of the deceased. The body was forwarded for autopsy to District Hospital, Banda, alongwith the relevant police papers. Post mortem was conducted on 10.8.1991 at 4 p.m., at the District Hospital, Banda, by Dr. M.L. Anandani, PW 2. The following ante mortem injuries were seen:

1. Abrasion 2 cm x 0.5 cm on left chin.
2. Abraded contusion 3 cm x 0.5 cm as dorsal aspect of right hand ulnar side.
3. Abraded contusion 2 x 1.5 cm at dorsal aspect of right elbow.
4. Abraded contusion 1.5 cm x 1 cm at dorsal aspect of right elbow, 2cm below injury No. 3.
5. Multiple abrasion in an area of 30 x 6 cm over dorsal and lateral aspect of forearm and arm.
6. Abraded contusion 20 cm x 34 cm over anterior aspect and lateral aspect of left abdomen and upper left thigh, 10 cm away from umbilicus.
7. Abraded contusion 29 cm x 30 cm over right upper thigh and lower part of abdomen over anterior and lateral aspect?

4. During investigation, truck No. URQ 3660 was said to have been involved in this incident Its driver was the Appellant Ayoob and the accompanying persons were Margoob, Asloob and Fazil. The said persons were made baparda and investigation was done. On the basis of identification, a charge-sheet under Sections 302 and 394 IPC was submitted against the Appellants Ayoob and Margoob, Asloob and Fazil. On 2.4.2002 a charge was framed against the Appellants and Asloob u/s 394, 302 read with Section 34 IPC. The Appellants pleaded not guilty and claimed trial.

5. The prosecution has examined P.W. 1 Home Guard Bhagirath, P.W. 2 Dr. M.L. Anandani, P.W. 3 H.C.P. Har Govind Singh, P.W. 4 Retired Constable Surendra Singh, P.W. 5 S.I. Ram Swaroop and P.W. 6 Constable Jairam Prajapati.
6. P.W. 1 Home Guard Bhagirath proved the identification memo (Ka 1). P.W. 2, Dr. M.L. Anandani, conducted autopsy (Ext. Ka-2) on the body of the deceased Constable Gopal. P.W. 3 H.C.P. Har Govind Singh prepared the check report (Ext. Ka-3) and the G.D. (Ext Ka-4) and the recovery memos of plastic shoe from the deceased (Ext. ka-5). Recovery memo of 45 cartridges of 303 bore rifle and "Vindolia" cloth (Ext. Ka-6) and the charge-sheet (Ext. Ka-7). The said charge-sheet was proved by this witness because the Investigating Officer Mahesh Babu Yadav had died and could not be examined. P.W. 4 Constable Surendra Singh proved the F.I.R. (Ext. Ka-1A). P.W. 5 Ram Swaroop proved the inquest report (Ext. Ka-8), letter for C.M.O. (Ext. Ka-9), report R.I. (Ext. Ka-10), challan nash (Ext Ka-11), photo lash (Ext Ka-12), sample seal (Ext. Ka-13). P.W. 6 Constable Jai Ram Pratap proved the site plan, recovery of rifle and cartridges (Ext Ka-14). The site plan of seizure of Truck No. URQ 3660 (Ext. Ka-15) and site plan (Ext. Ka-16).
7. As Asloob absconded at the stage of 313 Code of Criminal Procedure hence the Appellants Ayoob and Margoob were examined u/s 313 Code of Criminal Procedure. They denied having participated in the incident and stated that they would give evidence, but as a matter of fact they led no evidence.
8. According to Dr. M.L. Anandani, P.W. 2 who conducted post mortem on the corpse of Constable Gopal Yadav on 10.8.1991, the deceased was 28 years in age. Some vomit and other materials were coming out from his nose and mouth and faeces had leaked from his anus. On dissection the 7th, 8th, 9th and 10th ribs were fractured. Lung, diaphragm, and the left spleen were lacerated. On the right side the 10th and 11th ribs were fractured. There was no injury on the liver. According to the doctor, the deceased could have died as a result of ante mortem injuries. The doctor stated that injuries Nos. 5, 6 and 7 could have been caused due to accident from a truck or jeep. Injuries 1, 2, 3 and 4 were due to abrasions or by grazing of the body.
9. According to P.W. 1 Home Guard, Bhagirath, he alongwith the deceased, Constable Gopal Yadav were doing the duty of passing trucks in convoys on the date of incident near the Semri Nala. He further reiterated the version given in the F.I.R. P.W. 1 tried to stop the two trucks driven by the accused, but they did not stop, and only reduced their pace. P.W. 1 then told the driver that after 4-6 vehicles had arrived only then the two trucks which were following each other would be allowed to move. In the front truck there was only a driver and in the rear truck there were a driver and three other persons. The two trucks did not stop, but they were proceeding slowly. P.W. 1 and others kept on walking with the truck asking them to stop. Gopal was also following the trucks. Then the driver of the rear truck stated that he should be picked up, which was over heard by P.W. 1 and others. He was

running alongside the truck on the side on which the three occupants were sitting with the driver. The three passengers then pulled up the deceased into the truck. By means of torch and cabin light, P.W. 1 saw the incident and identified the accused. The trucks then fled away rapidly with Gopal in it. P.W. 1 and others ran 2-3 furlongs pursuing the trucks, but they did not stop. After 2-3 furlongs, P.W. 1 and others saw that Constable Gopal was lying on the ground, he was gasping for breath. His uniform was torn. For some time, P.W. 1 and others stood near Gopal. He had no Government rifle with him, as the truck occupants had taken the rifle away. After some time Gopal succumbed to his injuries at that spot. As it was rainy time, there was mud and slush, hence the truck numbers were unrecognizable. Two persons were coming from the side of Tendwari, and the informant Constable Surendra Singh proceeded to the police station on their scooter, where he lodged the F.I.R. P.W. 1 was called to jail to identify the accused. He recognized all the four accused persons. He signed on the identification memo (Ext. Ka-1), and again identified the accused persons 15 or 20 days after the incident. There were no chippis on the faces of the accused. After 10-20 minutes of Surendra Singh's departure, the police has arrived and carried the body to the police station.

10. P.W. 4 Constable Surendra Singh, the informant and the only other eye witness deposed that on the date of incident at about 6.30 p.m., he alongwith Constable Ram Gopal Yadav, the deceased carrying rifles and cartridges and Home Guard Bhagirath, who was carrying a danda left the police station for checking vehicles. At the school near Semari Nala at about 8 p.m., two empty trucks arrived from the side of Banda, who were instructed to proceed alongwith other vehicles in a convoy, but the truck drivers did not listen and started moving their trucks slowly. When Constable Ram Gopal Yadav approached the truck from the western side and flashed his torch and knocked on the window, the trucks did not stop. Then the persons in the rear truck picked up Ram Gopal and pulled him inside the cabin and thereafter rushed away with the trucks. P.W. 4 and others chased the trucks and at a distance of 2-3 furlongs they found that Ram Gopal has been thrown out and he had injuries on his person. His rifle and cartridges with magazine were missing. They claimed to have recognized the accused persons in the cabin and torch light, but because of slush and wet mud the number plates could not be read, as it was the rainy season. After the witnesses reached near Ram Gopal, a scooter arrived, and P.W. 4 proceeded on the scooter to the police station leaving Home Guard Bhagirath to look after the deceased. He lodged the report (Ext. Ka-1) in his writing. P.W. 4 recognized the accused persons in jail after their arrest. The accused persons were arrested from their home in Saharanpur and brought to the police station. They spent the entire night at the police station. The accused persons were examined by the Investigating officer in the presence of PW 4. He however could not remember whether their photographs appeared in the newspaper or not or whether they were photographed at the police station. P.W. 4 did not fire with his rifle on the truck. After P.W. 4 and others stopped the first truck, Ram Gopal hung on the window of

that truck, then the driver of the rear truck cried out to pull Ram Gopal inside, then his companions pulled him inside alongwith his arms.

11. Three submissions have been raised by the learned Senior Counsel for the Appellants.

Firstly, in the entire examination of the witnesses in Court, no witness has deposed that the Appellants who were present in Court were the persons who had participated in the incident, and had actually been seen by the witnesses at the time of incident and had again been identified by them at the test identification parade. It was further contended that the substantive evidence that is the evidence recorded in Court in identifying the unknown accused persons was confusing and it was not possible to record a conviction only on the basis of the test identification evidence.

Secondly, it was argued by the learned Counsel for the Appellants that there was some evidence that the Appellants have been shown to the witnesses in the police station prior to the test identification parade.

Thirdly, there was no affirmative link evidence for showing that the Appellants were kept baparda at all stages and that their identities had been kept concealed at all stages.

12. Learned A.G.A., on the other hand, argued that there was evidence of baparda and there was no reason for the false implication of these Appellants and that there was sufficient evidence for the trial Court to convict the Appellants, which had rightly recorded their conviction.

13. Before considering the submissions of the learned Counsel for the parties, we would like to clarify two things. There appears some contradiction in the version of the eye witness, PW 4 Surendra Singh, who has stated in his examination-in-chief, that after the trucks refused to stop, when they were asked to do so by the constables present, then the deceased Constable Ram Gopal came on the Western side of the road and again flased his torch and knocked on the window of the truck. Then Ram Gopal said that they were doing their duty for providing security to the trucks. Then the driver of the rear truck called out to his 3 companions to pull him inside and to murder him. Then the 3 companions opened the window and pulled him inside, and then the truck rapidly proceeded towards Tindwari. In his cross-examination however this witness states that first the deceased constable Ram Gopal had stopped the first truck, and was hanging on the window of the same truck. Then the driver of the rear truck called out to the truck driver in the first truck to pull him inside. Then his companions pulled him inside the first truck. Thus it was not even clear from the prosecution version whether the deceased was pulled inside the first or the second truck.

14. The second aspect is that a site plan (Ext. Ka 14) was prepared showing that a rifle and 4 cartridges were recovered from one person. The trial Court has noted in

its judgment, that that said accused was one Ranvir Singh @ Babban Singh, resident of district Pratapgarh (who is not an accused in the present case). His conviction by the lower Court was set aside by the learned Sessions Judge, Pratapgarh by order dated 11.11.1992, on the ground that the prosecution version in that case was that the accused of the present case had thrown their rifle on to another truck. Hence no recovery of the rifle of the deceased or cartridges or any other material has been shown from the accused of the present case.

15. As admittedly the truck numbers could not be read by the witnesses as they were covered by mud and slush, and no recovery has been made from any of the accused persons, the evidence of identification assumes great importance. But we find in the present case that out of the two identifying witnesses, PW 1 Home Guard Bhagirath has completely omitted to mention anywhere in his evidence that the accused who were present in Court were two of the persons that he had seen at the time of the commission of the offence, and subsequently he had identified them in the test identification proceedings which were held in jail.

16. The second witness PW4 Constable Surendra Singh, has even admitted that the Appellants were not even present in Court when his evidence was recorded. Therefore there was no question of his affirming that these were the same persons who had participated in the incident and whom he had identified in the identification proceedings held in jail. Learned Counsel for the Appellants is right in his submission that the substantive evidence in a case is only the evidence in Court. So far as the test identification proceedings are concerned, they are only conducted for the purpose of assuring the investigating agency that they are proceeding in the right directions, and that the accused who have been apprehended were the persons who had participated in the incident. (See *Rajbir v. State* LX 2008 ACC 813, *Ayyyb etc. v. State of U.P.* AIR 2002 SC 1192, *Daya Singh v. State of Haryana* XLII 2001 ACC 664 (SC), *Siddanki Ram Reddy v. State of A.P.* LXXII 2011 ACC 332 (SC) et al. After affirmative evidence is led by the prosecution in Court that the accused present in Court are the persons who participated in the incident, only then can the evidence of test identification proceedings be utilized for corroborating the statement of the witness u/s 157 of the Evidence Act.

17. It may be mentioned that in this connection Sri G.S. Chaturvedi drew our attention to paragraph 21 of the decision in [Asharfi and Another Vs. The State](#), It reads as follows:

21. To sum up. Any person can conduct a test identification, but Magistrates are preferred. His identification memo is a record of the statement which the identified expressly or impliedly made before him. The statement is a former statement of the identifier and in Court is usable not only for contradicting him u/s 145 or 155 of the Evidence Act but for corroborating him u/s 157, except that if it was made before the police it would be hit by Section 162 Code of Criminal Procedure and would therefore not be admissible for purposes of corroboration.

If the person holding the identification is a Magistrate of the first class, or one of the second class specially empowered, Section 164 Code of Criminal Procedure applies and his identification memo is admissible in evidence u/s 80 of the Evidence Act without proof. But if other Magistrates, or private persons, hold it they must be called in evidence to prove their memo. Where Section 164 Code of Criminal Procedure operates the proceedings are independent even of the territorial jurisdiction of the Magistrate concerned.

18. We would like to clarify here that the said decision in Asharfi insofar as it relates to the admissibility of the identification memo without production of the Magistrate in view of Section 80 of the Evidence Act is concerned, has been overruled in the Full Bench decision of this Court in Sheo Raj v. State : 1964 Cri LJ 1 (Vol. 69). In the latter decision it has been held that the test identification memo prepared by a Magistrate purportedly acting u/s 164 Code of Criminal Procedure is not evidence recorded in a Court in a judicial proceeding, because nothing has to be proved or disproved before the Magistrate at that stage and it cannot be presumed to be genuine and is thus not admissible without proof u/s 80 of the Evidence Act, as Section 80 deals with the memorandum of evidence given in a judicial proceeding.

19. Even otherwise there are other difficulties in relying on the prosecution case. The witnesses claim to have seen the accused in torch and cabin lights. We think in this scarce and inadequate light it would be difficult to identify the Appellants who were sitting inside the moving trucks, as the police personnel eye witnesses appear to be at some distance at that time. We also see little reason why the occupants of the truck would keep the cabin lights on, if they wanted to ignore the instructions of the police personnel to stop the trucks and to proceed in a convoy only when a few other trucks had arrived. Also if the accused shared an intention to pull the deceased constable into their truck for the purpose of murdering him, there was no reason for them to keep the lights switched on in the cabin for this purpose.

20. PW1 Home Guard Bhagirath Singh has even admitted in one point of his cross-examination that Surendra Singh helped him recognize the 4 accused Appellants. After that he went to identify the accused in the test identification proceedings in jail. He also admits in his cross-examination that after the accused were arrested he was called to the police station for identifying them. But later he half heartedly adds that he does not remember this fact.

21. The other eye-witness PW 4 Constable Surendra Singh admits in his cross-examination that after their arrest the accused were kept the whole night at the police station. He does not remember whether the accused were kept 2 or 3 days or 3 or 4 days at the police station or whether they were questioned by the Investigating officer at the police station, or whether they were photographed or not and whether the photographs were published. Significantly he does not categorically deny these facts. He also admits that the Investigating officer took him for the purpose of identification but later adds that the investigating officer stopped

at Banda and he proceeded to the jail for identifying the accused alongwith HG Bhagirath Singh.

22. We also find that there is no affirmative link evidence given by the prosecution that the accused were kept baparda after their arrest, and that precautions were taken for concealment of the identity of the accused until the holding of the identification parade and no opportunity was allowed to the witnesses to see and identify them prior to the test identification proceedings.

It has been held in paragraph 35 in [Asharfi and Another Vs. The State](#),

... It is the duty of the prosecution to show that from the time of the arrest of an accused person to the time of his admission into the jail precautions were taken to ensure that he was not seen by any outsider.

And again in the same paragraph it is added:

... If therefore the prosecution have led evidence to show that from the time of arrest of an accused to the time of his admission into the jail precautions were taken to ensure that he was not seen by any outsider, and if the identifying witnesses depose that they never saw him at any time between the crime and the identification parade, the burden lying on the prosecution has been discharged. If is then for the accused to establish that he was shown. The law does not require him to do so affirmatively; it is sufficient if he can succeed in creating a reasonable doubt in the mind of the Court.

Direct evidence may not be available, but he may discharge his burden by showing, for example, that he and the witnesses were present in the police-station at the same time, or that he was marched through the village of the witnesses or that the witnesses were present at the office of the Prosecuting Inspector when his jail warrant was being prepared. But if he fails to raise a reasonable doubt the law enjoins that the prosecution evidence on the matter be accepted. In dealing with such questions it is often ignored that the accused is a total stranger to the witnesses and that save for exceptional cases he is a stranger to the police too, hence neither the witnesses nor the police have any motive for incriminating him falsely.

This part of the enunciation of the statement of the law as mentioned in Asharfi still holds good and does not appear to have been dispelled in any subsequent decisions. In [Bollavaram Pedda Narsi Reddy and others Vs. State of Andhra Pradesh](#), [Chaman Vs. State of U.P.](#), and [Tahir Mohammad, Kamad Girendra Singh and another, Badri Singh and others Vs. State of Madhya Pradesh](#), it has been observed that the value of the identification parade depends on the effectiveness and the precautions taken against the persons to be identified before they are paraded with others and it is for the prosecution to eliminate the possibility of the accused being shown to the witnesses.

23. Based on the aforesaid case law it may be held that the prosecution has failed to lead positive evidence for ruling out that the accused were not shown any time after his arrest till the time of his identification in jail. Also in the circumstances of the present case indicated above the accused have succeeded in raising a doubt in our mind that the accused may have been shown to the witnesses prior to their test identification proceedings at the police station or otherwise. Coupled with this we have also noted that the witnesses failed to give any affirmative substantive evidence identifying the Appellants in Court and also clarifying that the accused present in Court were the persons that they had seen at the time of incident and thereafter at the test identification proceedings.

After a consideration of the totality of circumstances of this case, we are of the view that the Appellants have succeeded in raising a doubt regarding the reliability and value of the evidence for showing their complicity in this offence. The result is that this appeal succeeds and the trial Court judgment convicting and sentencing the Appellants as above deserves to be set aside.

The Appellants are in jail. They should be set at liberty unless wanted in connection with any other offence.

The appeal is accordingly allowed.