

(2003) 03 AHC CK 0184**Allahabad High Court****Case No:** Criminal Appeal No. 3478 of 1984

Jhamman Yadav and Others (in
Jail)

APPELLANT**Vs**

The State

RESPONDENT**Date of Decision:** March 13, 2003**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 300, 34

Citation: (2003) CriLJ 4122**Hon'ble Judges:** Y.R. Tripathi, J; M.C. Jain, J**Bench:** Division Bench**Advocate:** T. Rathore and G.S. Chaturvedi, for the Appellant; M.C. Joshi, Manish Tiwary, A.K. Awasti, Shashank Shekhar and V.C. Tewari, A.G.A., for the Respondent**Final Decision:** Dismissed

Judgement

Y.R. Tripathi, J.

Appellants Jhamman Yadav, Radhey Yadav, Nandu and Agardu, having been convicted of the charge u/s 302 read with Section 34, I.P.C. and sentenced to Imprisonment for Life by Sri G.S. Chaube, the then Special Judge, Varanasi in Sessions Trial No. 538 of 1982 relating to P. S, Cholapur, District Varanasi, have preferred this appeal.

2. The facts leading to this appeal, in short, are that in the wee hours on 9-11-1982, the informant Jitendra Kumar Singh accompanied by his elder brother Surendra Singh and collaterals Paras Singh (P.W. 2) and Babban Singh (P.W. 3) had gone to the pumping set of Ram Dular Kurmi (P.W. 5) of his village to irrigate his field lying to the north of that pumping set at a distance of about 200 steps. At the time of their arrival at the pumping set, the field of one Ram Adhar Singh was being irrigated. Ram Dular at that time was not present there. Jitendra Kumar Singh his deceased brother Surendra Singh, Paras Singh and Babban Singh sat, on the cots lying

beneath a Chhappar overhanging the eastern wall of the room of the pumping set in wait of Ram Dular. It is said that at about 5 a.m. appellants Jhamman Yadav, Rathey Yadav, Nandu and Agardu, all armed with country-made pistols, appeared there and out of them, Agardu, Nandu and Jhamman Yadav dragged Surendra Singh to the north of the Chhappar and shot at him from their respective weapons causing his instantaneous death. During the course of incident, appellant Radhey Yadav stood by the side of the Information and other witnesses present there and issued threats, saying that if any of them moved from his place, he would kill him. It is also alleged that while dragging Surendra Singh, Radhey Yadav had exhorted his companions to kill him, saying that it was he who was doing Pairvi of cases and with his death, all matters would stand resolved. After the incident, all the accused managed to run away through the sugarcane field of Ram Dular lying to the east of his pumping set. At the time of incident, an electric bulb was allegedly glowing at the pumping set and there was also moonlight in which the witnesses are said to have identified the assailants. Soon after the incident, Jitendra Kumar Singh (P.W. 1) set out for P. S. Cholapur, which lies to the south of the place of occurrence at a distance of four miles. On his way to police station, he scribed a written report (Ext. Kha-1) and made it over at the police station, on the basis of which Syed Hasan Muztaba, then posted as Head Moharrir at P. S. Cholapur, drew Chik F.I.R, (Ext. Ka-2) and registered a case against the accused vide G. D. (Ext. Ka 3) at 6.15 a.m. Inspector S. P. N. Tripathi (P.W. 8) at that time was posted as Station Officer P. S, Cholapur. On registration of the case, he swung into action, took the investigation of this case in his hand and after recording the statement of the informant, proceeded to the spot where he held inquest on the dead body of the victim and after completing other necessary formalities, sealed the dead body and sent it to mortuary at Varanasi through constables Mohammad Yousuf Khan and Umesh Kumar Pandey for its post-mortem examination, which was conducted by Dr. P. N. Shukla (P.W. 7) then posted as Medical Officer S. S. P. G. Hospital, Varanasi at 2 p.m. on 9-11-1982. According to Dr. Shukla, the body of the deceased was of average built. The eyes were half-opened and mouth partially opened. Dr. Shukla found the following ante-mortem injuries on the dead body:

1. Gun shot wound 3 cms x 3 cms on the right side abdomen upper part 10 cms below the right nipple, 6 cms lateral to mid-line of abdomen. (Wound of entry) Margins inverted. Blackening around wound present.
2. Gun shot wound of entry 2 cms x 2 cms on the front and middle of chest, 7 cms below the external notch.
3. Gun shot wound 8 cms x 5 cms on the top and back of right shoulder caused by slanting bullet passing from below and back to front and top of right shoulder.
4. Gun shot wound of exit $\frac{1}{2}$ cm x $\frac{1}{2}$ cm on the back of right side chest, 2 cms below the angle of right scapula at 6 O'clock position.

On internal examination, he found as follows:

1. Gun shot wound in continuation of injury No. 2 piercing the body of sternum at the level of 3rd rib, pericardium, arch of aorta and right side lung upper and middle parts. About one litre blood present in right chest cavity, 3 pellets (big size) present in the skin of right chest cavity near the injury No. 4.
2. Gun shot wound in continuation to injury No. 1 piercing at the level of 8th and 9th ribs, upper part of right lobe of liver. 8 pellets (small size) and pellet wad found in the abdominal cavity, half litre blood present in the abdominal cavity.
3. As per post-mortem report, the victim had died due to shock and haemorrhage as a result of ante-mortem gun shot injuries. In the opinion of Dr. Shukla, ante-mortem injuries 1 to 3 were possible by three shots and injury No. 4 was the exit of injury No. 2. He was of the view that the ante-mortem injuries could have been caused around 5 a.m. on 9-11-1982.
4. It transpires that the police of P. S. Cholapur, after due investigation of the case presented charge-sheet against the appellants, which culminated into their trial.
5. The case of the appellants was that of denial and false implication.
6. During the course of trial, the prosecution examined Jitendra Kumar Singh P.W. 1, the informant, Paras Singh P.W. 2, Babban Singh P.W. 3, all witnesses of fact, Ram Dular P.W. 4 at whose pumping set the incident took place, Head Constable Syed Hasan Muztaba, scribe of the Chik Report and the G. D. through which the case was registered, Constable Mohammad Yousuf Khan P.W. 6, who along with constable Umesh Kumar Pandey had taken the dead body of the victim to the mortuary for its post-mortem examination, Dr. P. N. Shukla, Medical Officer S.S.P.G. Hospital, Varanasi P.W. 8 who held autopsy on the dead body of the victim and Inspector S. P. N. Tripathi P.W. 8, the Investigating Officer.
7. The defence produced one Indrasan Rai, D.W. 1, a Junior Engineer then posted at 33.11 KV Sub-station Cholapur to prove that there was no supply of electricity at the pumping set of Ram Dular at the time of the alleged incident.
8. The learned trial Court after considering the evidence led by both the parties, found the complicity of the appellants in the incident proved and it accordingly holding them guilty of the charge u/s 302 read with Section 34, I.P.C. convicted and sentenced them as aforesaid through its impugned judgment and order, dissatisfied from which the appellants have come up in this appeal.
9. We have heard parties" counsel in great detail and have gone through the materials on record.
10. The factum of occurrence and the unnatural death of the victim Surendra Singh are not disputed in this case. What has been disputed is the involvement of the appellants and it has first of all been urged that the evidence led by the prosecution

consists of witnesses, who are highly interested and inimical. It cannot be disputed that the three factual witnesses produced are closely related to the deceased, Jitendra Kumar Singh (P.W. 1) is the real brother of the deceased and the other two witnesses Paras Singh (P.W. 2) and Babban Singh (P.W. 3) are his collaterals. Whereas Paras Singh is the son of real brother of the grandfather of the deceased. Babban Singh is his real uncle. There is, therefore, no dispute about all the three factual witnesses being inter se related. There are also materials on record to show that there was daggers drawn enmity between the family of the deceased and that of the appellant Jhamman. Jitendra Kumar Singh (P.W. 1) has himself admitted that Jhamman, Sia Ram and Jannu had killed his father about fifteen years prior to the incident and they had been prosecuted for that offence. He has also stated that Jhamman, Agardu, Radhey, Girja and Sadhu had caused injuries to his two brothers Ravi Shankar and Kasinath. He has further stated that Jhamman, Agardu, Radhey, Girja, Sadhu and some others had beaten up his younger brother Kapil Deo and in respect of that incident, a case u/s 307, I.P.C. was pending against them at the time of occurrence. The defence too has filed a number of documents suggesting that several criminal cases were either fought or were pending between the parties at the time of occurrence. Enmity cuts both ends. On the basis of enmity and inter se relation of the witnesses, the evidence led by the prosecution in this case could not have been thrown out. It is by now well settled that in cases where the witnesses are inimical and interested, their evidence should be approached with care and caution. In view of the fact that the incident took place outside, the village at a time when no villager in ordinary course would have been present at the spot, the non-production of any independent witness can hardly be a ground for disbelieving the prosecution case. So far as the presence of three prosecution witnesses is concerned, it would be found that the deceased along with these witnesses had allegedly gone to the pumping set of Ram Dular to irrigate his field lying to the north of that pumping set. It is a matter of common experience that more than one person are required in the process of irrigation. Besides, there being bad blood between the members of the family of the deceased and the appellants and some others, it was but natural for the deceased and his brother to have taken some other persons also with them while going to the pumping set of Ram Dular lying at a lonely place outside the village, that too in the wee hours. The field of Jitendra Kumar Singh (P.W. 1), which was to be irrigated on the date of occurrence measures about 4 bighas necessitating the involvement of certain persons to facilitate the irrigation by looking after the drain and constructing new Nalis in the field according to requirement. The presence of the three factual witnesses on the spot, therefore, in no way appears to be either improbable or unnatural.

11. The evidence on record also shows that there is no other village in close vicinity of the place of occurrence. The incident is said to have taken place in early hours when there was no occasion for any other person to be present nearby the site of the occurrence. The non-production of an independent witness, therefore, can

hardly be said to have any impact on the truthfulness of the prosecution case.

12. Adverting to the evidentiary value of the three factual witnesses which has been assailed on various grounds, it would be found that all the three witnesses have supported each other on material particulars. The learned counsel for the appellant has sought to discredit them merely on the ground of certain so-called omissions and contradictions, which are too insignificant to be taken notice of. It has been argued that none of the prosecution witnesses had stated to the Investigating Officer that he was sitting on cot beneath the Chhappar over-hanging the eastern wall of the room of the pumping set. True, that neither in the F.I.R. nor in the statement of any of the factual witnesses recorded u/s 161, Cr. P. C. it has come that at the time of incident he and others were sitting on cots but it goes without saying that F.I.R. is not an encyclopaedia to contain all such details. The witnesses being village rustics were not expected to have stated this fact to the Investigating Officer without specifically being questioned on this point. The evidence on record shows that the Investigating Officer had visited the place of occurrence just after a few hours of the incident and had prepared the site-plan on the pointing out of some of the factual witnesses. He has shown the location of the cots in the Chhappar. This itself shows that the Investigating Officer must have been told as to where the witnesses were sitting at the time of occurrence, else there was no reason for him to have shown the position of cots lying in the Chhappar.

13. It was then argued that Jitendra Kumar Singh (P.W. 1) did not say, during the course of his interrogation by the Investigating Officer, that he had always been irrigating his field from the pumping set of Ram Dular. His evidence no doubt shows that there is another tubewell of Birju Kurmi in that vicinity, but its level is so low that irrigation of his field is not possible therefrom. Ram Dular (P.W. 4) too has supported his evidence on this point and has stated that the field of Jitendra Kumar Singh (P.W. 1) has always been irrigated from his pumping set. We thus see no reason to disbelieve either Jitendra Kumar Singh or Ram Dular on this point.

14. The evidence of other factual witnesses Paras Singh (P.W. 2) and Babban Singh (P.W. 3) is sought to be belied on the ground of their enmity with the appellants. We have seen above that from before the incident, the family members of the informant including the two aforesaid witnesses Paras Singh and Babban Singh were on litigating terms with the appellants. There was, therefore, nothing unnatural if Paras Singh and Babban Singh used to render help to Jitendra Kumar Singh, the informant, in the litigations. In some of the litigations, they were also involved along with the deceased and the informant.

15. It was next contended that initially in the F.I.R. it was alleged that all the appellants dragged Surendra Singh to the north of the Chhappar where three of them, namely, Jhamman, Agardu and Nandu shot at him from their respective pistols, but at the stage of evidence a deviation from the F.I.R. version has been made and the eyewitnesses produced have stated that it were only Jhamman,

Agardu and Nandu who took away Surendra Singh to the north of the Chhappar and fired shots at him. It would be found that there is a specific mention in the F.I.R. that Radhey Yadav armed with country-made pistol remained present near the factual witnesses during the incident and kept on threatening them and he did not participate in actual shooting. We hardly see any contradiction between the F.I.R. version and the evidence of factual witnesses on this point.

16. It was then further argued that there are also some contradictions about the place where the victim was shot at and the, mariner of commission of the offence. It is found that the factual witnesses have stated that the appellants took Surendra Singh 4-5 steps to the north of the Chhappar and shot at him there. The Investigating Officer has stated that the body of the deceased was lying about 20 steps to the north of the pumping set of Ram Dular. The distance of the place of occurrence from Chhappar has been described by the witnesses on the basis of their estimation and it in no way belies their evidence so far as the factum of occurrence and the participation of the appellants in the incident are concerned. The defence itself does not seriously dispute the situs of the occurrence and has thrown a suggestion to Jitendra Kumar Singh that the deceased was done to death by his companion gamblers over some dispute while gambling in the Chhappar. The learned counsel for the appellants, taking us through the evidence of factual witnesses, pointed out some other contradictions, which, in our opinion, have hardly any relevance,

16A. It was next contended that the Incident took place two or three days before or after the Diwali festival when people generally gamble. Taking us through the statement of Ram Dular (P.W. 4) it has been urged that the enquiry made by the Investigating Officer from Ram Dular as to whether his Chhappar was being used for gambling, Indicates that the assailants were not known till then and the Investigating Officer was exploring various probabilities to track down the real assailants. True, Ram Dular has stated about such an enquiry having been made from him by the Investigating Officer and his having denied the Chhappar being used for gambling, but the Investigating Officer has not been confronted with the said statement of Ram Dular. Ram Dular is a village rustic and appears to have been either trapped by the cleverly question put to him by the defence counsel or by making such a statement has obliged the appellants by giving them a base to build their defence. It was also contended that Ram Dular has given a conflicting reason for his absence from the pumping set at the time of arrival of the informant and his companions. At one place he is found to have stated that he at that time had gone to his house to call his son and in the next breath he has stated that he had gone to his house to give fodder to his cattle. This contradiction hardly matters as Ram Dular is not a factual witness. It is also possible that he might have left his pumping set for both the aforesaid purposes i.e. to take back his son to the pumping set as also to give fodder to his cattle.

17. The learned counsel for the appellants then referring to certain excerpts of the statements of factual witnesses made a futile attempt to belie their presence on the spot on the ground of certain contradictions made by them with regard to position of the appellants and the deceased at the time of actual shooting. One can visualise the situation at the time of incident. All the four appellants armed with country-made pistols had appeared on the scene all of a sudden and some of them had dragged Surendra Singh to some distance and one was keeping guard on the witnesses and issuing threats by them not to move from their respective positions, In such a terror surcharged situation, it would not have been possible for any of the scared witnesses to have made minute observation about the position of either the deceased or the assailants at the time of firing. The failure of these witnesses, therefore, to give picturesque account of the actual incident, to our mind, can hardly be taken to be fatal. The presence of blackening around ante-mortem injury No, 1 as also the fact that the deceased had sustained as many as four exit wounds, lend support to the prosecution version about the first shot on the deceased having been fired by appellant Jhamman from close range and the other two appellants Agardu and Nandu firing the subsequent shots with a view to ensure the death of the victim. The ante-mortem injuries thus found on the person of the victim besides being compatible with the number of the assailants, also fit in with the ocular account given by the factual witnesses.

18. The learned counsel for the appellants then in an attempt to belie the existence of light on the pumping set of Ram Dular at the time of occurrence referred to the statement of Indrasan Rai and urged that from the entries of log-sheet proved by Indrasan Rai, there did not exist any light on the pumping set of Ram Dular at the time of incident, which too belies the incident having taken place in the manner and fashion as alleged by the prosecution. From the evidence of Indrasan Rai D.W. 1 it is borne out that certain entries in the log-sheet are in different handwriting. The learned trial Court has discussed at length this aspect of the case and relying on the evidence of factual witnesses and Ram Dular P.W. 4 the owner of pumping set, has held that there was electric supply at the time of occurrence. We do not see any reason to disagree with the conclusion drawn by the learned trial Court on this point.

19. So far as the place of occurrence is concerned, besides there being sufficient materials to show that the incident took place at the pumping set of Ram Dular, the defence too has not challenged it. It has rather thrown a suggestion to Jitendra Kumar Singh P.W. 1 that the victim was done to death by his companion gamblers. It does not stand to reason that in order to feed far his grudge against the appellants, the informant would have screened the real assailants of his brother with whom he had an immediate grievance,

20. Thus on an overall consideration of the materials on record, we are of the view that the learned trial Court has, on proper appraisal of the evidence on record,

rightly concluded about the complicity of the appellants in the Incident. From the facts proved, we are also of the view that it was a cold-blooded murder having been executed by the appellants in a well planned manner, The injuries found in the post-mortem examination of the victim also indicate that they were sufficient in ordinary course to cause his death. The appellants thus appear to have rightly been convicted and sentenced u/s 302, I.P.C. read with Section 34, I.P.C. and the impugned judgment and order of the learned trial Court does not, warrant any interference.

21. In view of what has been observed above we find no merit in this appeal.

22. The appeal is accordingly dismissed.

23. The appellants are on bail. The Chief Judicial Magistrate, Varanasi shall cause them to be arrested and sent to jail to serve out the sentence imposed on them. He shall also submit compliance report within one month.