

Diwan Singh and Another Vs State of U.P.

Court: Allahabad High Court

Date of Decision: Nov. 29, 1995

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€” Section 161
Penal Code, 1860 (IPC) â€” Section 302, 307, 323, 34

Citation: (1996) 20 ACR 270

Hon'ble Judges: S.K. Verma, J; B.S. Chauhan, J

Bench: Division Bench

Advocate: Viresh Misra, A.P. Gupta, S.S. Tiwari and A.R. Gupta, for the Appellant; D.G.A., for the Respondent

Judgement

B.S. Chauhan, J.

This is an appeal against the judgment and order dated 22.2.1979 passed by the IIInd Additional Sessions Judge,

Moradabrd passed In sessions trial No. 335 of 1978 where in the Appellants have been convicted u/s 302, I.P.C. and awarded the imprisonment

for life, u/s 323/34, I.P.C. R.I. for six months and u/s 307/34, I.P.C. R.I. for four years. However, all the sentences have been directed to run

concurrently.

2. According to the prosecution, the case is that on 20/21.12.77 at about midnight the Appellants along with two other co-accused namely,

Rajendra Singh and Badam Singh all armed with single barrel guns entered the house of injured complainant, Ali Mohammad, P.W. 2 where the

complainant was sleeping along with his father Niadar Bukhsh, deceased, aged about 75 years and his son, Zaheer Ahmad. The said three persons

were sleeping on the sugar cane leaves and there was sufficient light of the lantern (Ext. 2) inside the above said premises at that time. All the said

three persons belonging to the complainant side were lying covered with separate quilts. After hearing the noise of the footsteps of the above said

accused persons, complainant Ali Mohammad, P.W. 2 had awaken. Appellant No. 2 Mahendra Singh fired a shot on the person of the deceased

Niadar Bukhsh hitting him in his abdomen leaving a clear mark on the quilt which the deceased had put on. Ali Mohammad, P.W. 2 immediately

rushed towards Mahendra Singh, Appellant No. 2 and caught hold of him by the cloths. Accused, Mahendra Singh dragged the complainant Ali

Mohammad, P.W. 2 and took him out of the said part of the premises causing him injuries on the knees. At the instigation of co-accused, Sadam

Singh, Appellant, Diwan Singh fired a shot on complainant, Ali Mohammad, P.W. 2. However, the said shot missed its target and hit the wall of

the said premises. Appellant Mahendra Singh got himself released from the complainant. After hearing the cries of the complainant, Ali Mohammad

and his son Zaheer Ahmad, witnesses Sharif Ahmad, P.W. 4 Sukhan, P.W. 5 and other persons reached the place of occurrence and on being

challenged by the said witnesses the accused persons fired their guns in the air and escaped from that place. Deceased Niadar Bukhsh had died

spontaneously by the gunshot wounds caused by the Appellant, Mahendra Singh.

3. A written report was scribed by Sharif Ahmad P.W. 4 of the said incident on the dictation of the complainant, Ali Mohammad, P.W. 2 which

was handed over by the said complainant to Har Dayal Singh, Head Muharrir, P.W. 3 at police station Didauli on 20/21.12.77 at 3.20 a.m. Har

Dayal Singh, P.W. 3 also found the injuries on the person of the complainant, Ali Mohammad which was duly noted in the general diary. The

complainant was referred to Dr. B.C. Khanna, P.W. 9 who examined the said complainant on 21.12.77 at about 1 p.m. and found the following

injuries on his person:

1. Abrasion 2 cm. x 1 cm. on the inner aspect of front of left knee just inner to upper inner end of left patella bone, reddish brown scap present,

which do not bleed after scabbing, surrounding margins are red. No tailing present. No mud particles are attached or embedded.

2. Multiple abrasions in an area of 2.5 cm. x 2.5 cm. on the antero medial aspect of upper part of left leg just inner side of tibial tubercle, reddish

brown surface-scab present. No bleeding no scabbing. No mud particles embedded heaped up surface present on lower side of abrasions.

4. In the opinion of Dr. Khanna, P.W. 9 the above side two injuries of the complainant were simple in nature and caused by friction against some

hard object and were about half a day old at the time of his medical examination. According to Dr. Khanna, P.W. 9, the said injuries could have

been received by the complainant on the night between 20th and 21st of December, 1977 at about 12 O'clock in the night.

5. The dead body was recovered by the Investigating Officer, K.P. Gupta, S.I. who could not be examined by the prosecution, because of his

death at the time of trial, conducted the preliminary investigation of the case, took the dead body of the deceased Niadar Bukhsh in his custody

and sent it for post mortem examination in a sealed cover. Dr. B.K. Sinha, P.W. 12 conducted the post mortem examination of the dead body of

the deceased Niadar Bukhsh on 21.12.1977 at about 4 p.m. and found the following ante mortem injuries on the person of the deceased Niadar

Bukhsh:

1. Gun shot wound of entrance 1 cm. x 6 cm. in epigastric region, 4 cm. about umbilicus margins inverted blackening and scorching present

omentum and loops of intestines coming.

2 Gun shot wounds of exit six in number 0.3 cm. x 0.3 cm. each in an area of 4 cm. x 3 cm. on the right side of abdomen just above

umbilicus margins everted--no blackening or scorching present. Direction upwards to downwards, slightly backwards on front.

6. On the internal examination of the said dead body Dr. Sinha P.W. 12 found the rectum muscle lacerated up to pubic symphysis, peritonium was

found lacerated under the injury. The interior wall of the stomach was lacerated. Small intestine was lacerated at multiple places. Liver under injury

No. 1 was also lacerated. Gall bladder was also lacerated. Twenty small gunshots (Ext. 14) were recovered from rectum muscle and peritonal

cavity. Six small gunshots (Ext. 14) were taken out of the small intestine. One cap and 3 wadding (Ext. 15) were taken out from the liver. Bladder

was lacerated and 8 small shots (Ext. 16) were taken out of the same.

7. In the opinion of Dr. Sinha, P.W. 12 the death in this case was caused due to shock and haemorrhage as a result of the internal injuries received

by the deceased. The death in this case could have occurred on the night between 20th and 21st December, 1977 at about 12 O'clock and the

injury No. 1 of the said deceased was in the ordinary course of nature sufficient to cause the death of Niadar Bukhgh. Dr. Sinha had prepared the

post mortem report Ext. Ka. 20 at the time of his post-mortem examination.

8. K.C. Sharma, S.I. P.W. 8 recovered the licenced gun Ext. Ka 2 and it's licence belonging to Mahendra Singh, Appellant No. 2 from the shop

of an arms dealer in Hasanpur on 25.12.1977. The said gun was sealed then and there and deposited at police station Hasanpur at 5.30 p.m. and

entry was duly made in the general diary. K. C. Sharma, S.I. P.W. 8 also recovered the gun and its licence belonging to co-accused, Badam Singh

from another arms dealer in Moradabad. The said gun was duly sealed at the spot. Its recovery memo was prepared and the sealed gun was

deposited at police station, Kotwali, Moradabad at the same time. K. P. Gupta S.I. examined the witnesses, Ali Mohammad P.W. 2 Sharif

Ahmad, P.W. 4. Sukhan, P.W. 5 Nasrullah, P.W. 6 and others on 21.12.77 and recorded their statements u/s 161, Code of Criminal Procedure.

He also inspected the place of occurrence and prepared site plan Ext. Ka 12 and examined Suresh Chandra Saxena, P.W. 1 on 25.12.77. After

investigating the case, the charge-sheet was submitted against all the four accused and they were committed to sessions.

9. In support of its case the prosecution examined as many as 12 witnesses. S.C. Saxena P.W. 1, Ali Mohammad injured complainant, P.W. 2

Har Dayal Singh Head Muharrir, P.W. 3 Sharif Ahmad, P.W. 4 Sukhan, P.W. 5 Nasrullah, P.W. 6, Head Constable, Tej Pal Singh, P.W. 7 Sub-

Inspector K. C. Sharma, P.W. 8 Dr. B.C. Khanna, P.W. 9. B. Rai, Ballistic Expert, P.W. 10 Ram Nath Singh, Constable, P.W. 11 and Dr. B.K.

Sinha P.W. 12, were examined. Out of the aforesaid witnesses, Ali Mohammad P.W. 2 Sharif Ahmad, P.W. 4 and Sukhan, P.W. 5 have been

examined as the eye-witnesses.

10. All the said four accused had taken the defence that no such crime was committed by either of them and they had been falsely implicated in the

crime because of the enmity as the complainant party belonging to the other faction headed by Samar Pal who is rival to Appellant No. 2,

Mahendra Singh.

11. After considering the entire case, the learned IInd Additional Sessions Judge, Moradabad vide his judgment and order dated 22.2.79

convicted the Appellants but acquitted the co-accused, Rajendra Singh and Badam Singh giving them the benefit of doubt.

12. Co-accused, Rajendra Singh was 17 years of age and son of Appellant No. 1 Diwan Singh and the trial court reached the conclusion that as

no specific role has been attributed to him in committing the crime, he would have not probably been brought by the Appellant No. 1 along with

him. Similarly, co-accused, Badam Singh was also given the benefit of doubt as he had not done any overt act and the only allegation against him

had been of instigating the Appellant No. 1 Diwan Singh to kill the complainant, Ali Mohammad. The trial court took the view that it was wholly

unnatural and unprobably for co-accused. Badam Singh to instigate the Appellant No. 1, Diwan Singh as the co-accused, Badam Singh had

himself been armed with a gun and thus he was also acquitted.

13. We have heard very diligent and persuasive arguments of Shri S.S. Tewari, learned Senior Advocate assisted by Shri Viresh Mishra for the

Appellants and learned Government Advocate for the State.

14. The first contention raised on behalf of the Appellants has been that the court erred in accepting the testimony or the witnesses for convicting

the Appellants while their depositions were not found trustworthy so far as the participation of the said co-accused Rajendra Singh and Badam

Singh was concerned. This contention is devoid of any merit as the trial court has given very cogent and plausible reasons for doubting the

participation of co-accused Rajendra Singh, Badam Singh as stated above. Moreover, no specific role has been attributed to the said two co-

accused so far as killing of deceased Niadar Baksh or attempting to kill Ali Mohammad, P.W. 2 is concerned. It is settled law that the maxim

falsus in uno falsus in omnibus cannot be applied mechanically and the mere fact that the depositions of the witnesses were not found clinching or

convincing for convicting the co-accused cannot be a good ground to discard the entire case of the prosecution. It merely warrants the court to

scrutinise the evidence more carefully. Nadoloi Jayaraman and Ors. v. State of Tamil Nadu 1992 Suppl. (3) SCC 161.

15. The next contention on behalf of the Appellants has been that the prosecution has not examined any independent witness to prove its case

instead witnesses namely, Ali Mohammad P.W. 2, Sharif, P.W. 4 and Nasrullah, P.W. 6 have been examined, who were closely interested and

partisan witnesses. Sukhan, P.W. 5 who had been disbelieved by the trial court is also close relative of the complainant. As there was bitterness

and enmity between the complainant and the Appellants, it has been contended vociferously that in such a case non-examination of the independent

witness is always fatal to the case of the prosecution. Moreover, the prosecution has withheld Zaheer Ahmad, who was alleged to have been

sleeping along with the deceased Niadar Bakhsh and complainant, Ali Mohammad at the time of incident. Non-examination of Zaheer Ahmad

does not go to the root of the cause as he could not have revealed or unfold anything which has not been stated by Ali Mohammad P.W. 2. The

prosecution may be justified in not examining him just to avoid the duplication multiplicity of the same evidence. So far as the other aspects are

concerned, the other eye-witnesses being neighbours and close relatives were the most natural witnesses and their presence cannot be doubted.

16. It is our considered opinion that the prosecution case does not suffer from any kind of material irregularity or illegality for non-examining any

other independent witness as it is settled law that the depositions of the close relations/interested and partisan witnesses requires a very careful

scrutiny and the same cannot be rejected merely because the witness happened to be close relative of the victim. In the case of Mohd. Aslam alias

Kuyian Vs. State of U.P., the Supreme Court has observed as under:

The mere fact that there was enmity and bitterness between the two groups, by itself does not establish that the eye witnesses falsely implicated the

accused/Appellant.... In the instant case, there are eye-witnesses to the occurrence and there are no intrinsic discrepancies in their evidence. Even

if it is assumed that such, eye-witnesses belongs to the group of complainant, their evidences are not liable to be discarded on that score if such

evidences otherwise inspire confidence and get corroborated by other evidence and from the nature of injuries, sustained by the deceased persons.

17. It has vehemently been argued on behalf of the Appellants that there were too many contradictions, omissions, improvement in the statement of

the witnesses that their testimonies cannot safely be relied upon for the conviction of the Appellants. It has been pointed out by Shri S.S. Tewari,

learned Counsel for the Appellants that all the witnesses have stated that the Appellants as well as the co-accused had fired several rounds though

the Khokhas were not recovered, that there was no reason for keeping the door open, particularly, in view of the statement made by the said

witnesses that latches were there to close the door. The learned trial court has given a specific finding that one of the witnesses was cross-

examined and specifically asked whether the latches were there at the time of incident and it was certainly there on the date when the depositions

were made.

18. Sri Tewari could not point out any single material discrepancy which goes to the very root of the case and assuming that there are some

discrepancies and omissions, they are insignificant as each of the witnesses cannot be expected to note the detail in seriatim. It is well established

that exaggerations, embellishments and inconsistency on the fringe not make witnesses unreliable. Kaki Ramesh and Others Vs. State of A.P., .

Moreover, the fact that it has specifically been mentioned in the F.I.R. as well as in the statement of Ali Mohammad, P.W. 2, that he was dragged

out by Mahendra Singh, Appellant No. 2, cannot create reasonable doubt regarding the presence of Ali Mohammad, P.W. 2 on the place of

occurrence and once the presence of the witnesses is established then minor discrepancies have to be overlooked. The suspicion entertained by

the defence that somebody else might have killed the deceased Niadar Bukhsh in the night and the Appellants have falsely been enroled in the

offence would thus be of no consequence for that alone could not lead to discredit the eye-witnesses in the instant case. On the other hand, if there

are minor discrepancies in the depositions of the witnesses, we may infer that the witnesses have not been tutored. The allegation that the villagers

had been faction ridden and merely because the complainant party had been the supporter of other faction, headed by one Samarpai, does not

convince us to infer that the Appellants have falsely been implicated at the behest of said Samarpai as the injured complainant, Ali Mohammad

P.W. 2 would be the last person to implicate those who had not participated in the crime and let go the real assailants though the possibility of

ropeing in some more persons cannot be ruled out. Ram Asray v. State of U.P. 1993 Suppl. (4) SCC 218 and State of Karnataka v. Bheemappa

and Ors. 1994 Suppl. (1) SCC 103.

19. It has further been contended on behalf of the Appellants that there was no sufficient or immediate motive for the Appellants to commit the said

offence. There has been consistent version of the prosecution witnesses that there was a dispute on the boundary "maindh" of the agricultural land

belonging to the Appellants and the complainant and there has been altercation and encroachment on the said land of the complainant by the

Appellants, which the complainant had got released subsequently. The aforesaid part of testimony of the complainant has not at all been challenged

by the Appellants. Moreover, the articulated argument that there was no imminent and immediate motive to commit the offence as there has been

sufficient gap of time between the said incident and the commencing of the offence, has no force as nobody knows how the minds of an individual

acts on a particular issue and the state of mind of an individual cannot be determined by any standard. However, there can be no denial to the fact

that the Appellants were having the grudge against the complainant. Further submission on behalf of the Appellants is that at the most the

Appellants might be having grudge against the complainant, Ali Mohammad, P.W. 2 and there can be no purpose of killing his father, deceased

Niadar Bukhsh. No doubt the grudge was against Ali Mohammad, P.W. 2, but killing the deceased Niadar Bukhsh was also a loss to the

complainant, Ali Mohammad P.W. 2. Moreover, it may also serve the purpose of the Appellants to create a reign of terror and establish their

supremacy over the other faction to which the complainant party belonged. It is also settled law that where there is a direct evidence, the issue of

motive becomes totally irrelevant. It has to be a necessary ingredient in case which hinges exclusively upon the circumstantial evidence. Sakharam

Vs. State of Madhya Pradesh, ; Chandra Mohan Tiwari and another Vs. State of Madhya Pradesh, ; Gurmej Singh and Ors. v. State of Punjab

1991 Suppl. (2) SCC 75 and Babu Lodhi v. State of U.P. AIR 1987 SC 1286.

20. It has further been argued on behalf of the Appellants that the injuries found on the person of the complainant might have been self-inflicted one

and it was inconsistent with the medical evidence and thus cannot be relied upon. The learned trial court has found the said part of the deposition of

the injured complainant as intrinsic, cogent and reliable as the injuries were also found on the front portion of the knees of the complainant and thus

the averments on behalf of the Appellants that the injuries were in the back of the knees and thus could not have been caused in the manner as

alleged by the prosecution has no force.

21. Shri Tewari, learned Counsel for the Appellants has further drawn attention of the Court to the fact that there is no over-act done by the

Appellant Diwan Singh. This argument is also devoid of any merit as it had been stated by the complainant himself that Appellant Diwan Singh had

fired a gunshot but it missed its target and hit the eastern wall of the said premises. The Investigating Officer has stated in his deposition that the

marks of the shot were found on the wall. Moreover, there was another reason for missing the shot as the complainant had caught hold of

Appellant No. 2, Mahendra Singh by his cloths, Appellant No. 1 Diwan Singh might be having an apprehension that if he fires aiming at the

complainant, it may also hit his associate Appellant No. 2, Mahendra Singh.

22. The contention on behalf of the Appellants is that there was no reason for the complainant, his father, deceased Niadar Bukhsh and his son

Zaheer to sleep at the place of occurrence particularly in view of the fact that they had a good accommodation in the nearby and they were having

30-35 cattles. This averment also has no force as there is nothing strange if all the three persons were sleeping there to protect their cattles.

23. There is a serious challenge regarding the recovery of guns and five empty cartridges. The argument on behalf of the Appellants is that the five

cartridges had been fired by the police party (Investigating Officer) after the recovery of the licenced gun of Appellant No. 2, Mahendra Singh

from the shop of Suresh Chandra Saxena, P.W. 1. This contention is totally preposterous as there is sufficient evidence on record to show that just

after the recovery of the said gun it was sealed and deposited at police station, Hasanpur and not in police station, Didauli where the empty

cartridges had been deposited and the said empty cartridges had been deposited at police station Didauli in the morning of 21.12.77, whereas the

gun was recovered from the said arms dealer at Hasanpur on 25.12.77. Moreover, the said version of the prosecution is supported by the Ballistic

Expert. B. Rai, P.W. 10, who opined that two of the above said five cartridges have been fired by the gun of Appellant No. 2, Mahendra Singh.

24. In view of the above, we find no merit in this criminal appeal and is hereby dismissed.

25. The Appellants are on bail. Their bail bonds are cancelled, sureties are discharged and they are directed to surrender forthwith before the

Chief Judicial Magistrate, Moradabad.