

(1995) 11 AHC CK 0111

Allahabad High Court

Case No: Criminal Appeal No. 779 of 1979

Diwan Singh and Another

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: Nov. 29, 1995

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161
- Penal Code, 1860 (IPC) - 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 IInd 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 awoken. 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 pattela 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 peritoneal 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 enroped 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 roping 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 catties. This averment also has no force as there is nothing strange if all the three persons were sleeping there to protect their catties.

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.