

(2008) 09 AHC CK 0262

Allahabad High Court

Case No: None

Samar Pal, Amar Pal and Sheo
Pal

APPELLANT

Vs

State

RESPONDENT

Date of Decision: Sept. 17, 2008

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 302, 34, 342

Hon'ble Judges: Shiv Shanker, J; Ajai Kumar Singh, J

Bench: Division Bench

Final Decision: Partly Allowed

Judgement

Ajai Kumar Singh, J.

The instant appeal has been preferred against the judgment and order dated 19.7.1982 passed by Sessions Judge Bijnor in Sessions Trial No. 21 of 1982 (State v. Sheo Pal and Ors.) convicting the appellant Sheo Pal u/s 302 IPC & sentencing him to undergo imprisonment for life and further convicting under Sections 342/34 IPC & sentencing to undergo rigorous imprisonment for six months and also convicting appellants Amar Pal and Samar Pal under Sections 302/34 IPC & u/s 342/34 IPC and sentencing them to undergo imprisonment for life and rigorous imprisonment for six months respectively.

2. Briefly stated the prosecution story as narrated in the first information report is that there was old enmity between the complainant Chandrapal Singh & his collaterals Mehar Singh, Jai Ram and Dileram and others. In the night intervening 20/21.7.1981 Sukhlal (deceased) father of the complainant Chandra Pal Singh was sleeping beneath his thatch (CHHAPPAR) in front of the kotha of his tubewell and Smt. Kalawati wife of Sukhpal & mother of the complainant was sleeping inside the Kotha of which door was not closed. Suddenly at about 2.30 to 3.00 A.M. in the night

Smt. Kalawati awoke on hearing the suppressed voice of Sukhlal and also on account of "Khatpat" and when Smt. Kalawati flashed torch light, she saw that (accused Samar Pal and Amar Pal both s/o Mehar Singh resident of same village Hatampur Khurd were pressing the body of Sukhlal on the cot and the accused Sheo Pal had placed barrel of the gun on his right temple.

3. Smt. Kalawati intervened and enquired from the accused accused Sheo Pal s/o Dileram fired shot at Sukhlal and subsequent thereto accused hurling abuses to Smt. Kalawati forcibly pushed her inside the Kotha and bolted the door from outside. On hearing the sound of firing the witness Begraj Singh came running from his house with lathi and torch and he saw all the three accused persons running away on the motor cycle towards Chandpur. The accused were identified by the mother of the complainant & the witness Begraj in the light of two torches. The victim Sukhlal died on the spot due to fire arm injury . The complainant on getting information reached on the spot and report of the occurrence was lodged at the police Ration Haldaur District Bijnore on 21.7.81 at 5.15 A.M. The head moharrir prepared the chick report (Ex.10) and the G.D. of registration p the case the copy of which being Ex.Ka.20.

4. The investigation of the case was entrusted to Sri Brij Mohan Sharma, the then Station Officer Police Station Haldaur. He reached at the place of occurrence and after nominating panchas prepared the inquest report Ex.Ka.11 alongwith connected papers of the dead body of deceased Sukhlal. He also took in his possession blood stained cloths from the cot on which deceased Sukhlal was lying and prepared .memo Ex.Ka.16. He collected samples of blood stained and plain earth from the place of occurrence and prepared memo Ex.Ka.17. He also took in possession the golden ear rings from the ears of the deceased and bedding spread on the cot which were entrusted to complainant Chandrapal Singh vide memo Ex.Ka.15 & Ex Ka 18 respectively.

5. The investigating officer inspected the place of occurrence and prepared site plan Ex.Ka.19. The dead body was sealed by him and sent for post mortem examination. He further inspected torches of Smt. Kalawati and Begraj and found them in working order and entrusted them back to those persons vide Memo Ex. Ka.1.

6. The autopsy of dead body was conducted by Dr. A.K. Dubey on 21.7.1981 at 3.30 p.m. and post mortem report Ex Ka.7 was prepared and following ante-mortem injuries were found.

Gun shot wound of entry, oval in shape, margins lacerated and inverted, 2 cm x 2 cm on right side face outer aspect 3 1/2 cm. in front of the upper part of right ear. Blackening and tattooing present. Burns of surrounding skin present Directing inwards downwards.

2. Gun shot wound of exit on left side of face 11 cm x 5 cm from the outer end left eye brow to the left side of the chin. Margins everted piercing of bones, brain matter

and muscle and tendons coming out of wound outer end of left eye also involved. In the opinion of doctor, the cause of death was shock & haemorrhage as a result of gun shot wound on vital organ i.e. brain.

7. After completing investigation, the investigating officer submitted charge sheet Ex.Ka.21 on 27.8.1981. The case was committed to the court of sessions on 22.1.82 by the then Magistrate.

8. The appellant Sheo Pal was charged for the offence punishable u/s 302 IPC and u/s 342/34 IPC and the appellants" accused Amar Pal & Samar Pal were charged for the offence punishable u/s 302/34 IPC read with Section 342/34 IPC.

9. In support of its case prosecution in all examined five witnesses. Smt. Kalawati P.W.1 is the widow of deceased Sukhlal and is an eye witness. Begraj P.W.2 is the nephew of the deceased who has seen the accused persons running from the spot on motor cycle after occurrence. Chandrapal P.W.3 is the son of deceased and is complainant. Constable Mahendra Singh P.W.4 is the formal witness who has proved the extracts of G.D. No. 15 dated 21.7.81 of 18.20 hours Ex.Ka. 8 and extracts of G.D. No. 2 dated 21.7.81 of 4.35 hours Ex.Ka.9. He has also deposed that dead body of deceased Sukhlal J. was entrusted to him for taking to mortuary which he took to mortuary I safely and did not allow anyone to touch or interfere with it.

10. S.O. Brij Mohan Sharma P.W.5 is the investigating officer who has proved the chick report Ex.Ka.10 and the copy of the G.D. of registration of the case Ex.Ka.20. Inquest report Ex.Ka.11 and connected papers Ex.Ka.12 to Ex.Ka.14. He has also proved the memos of supurdgi Ex.Ka.15 Ex.Ka.16, Ex.Ka.17, Ex.Ka.18 and Ex.Ka.19 .He has also proved the site plan Ex Ka 19 and the charge sheet Ex.Ka.20.

11. In their statements u/s 313 Cr.P.C. the accused have denied entire prosecution story and have pleaded that they have been falsely implicated in the aforesaid case on account of previous enmity.

No oral or documentary evidence has been adduced on behalf of appellants in defence.

12. After considering the evidence on record and hearing learned Counsel for the defence and the State, learned trial court convicted and sentenced the appellants as above vide judgment and order dated 19.7.1982. Feeling aggrieved the present appeal has been preferred.

13. Heard Sri P.N. Mishra, learned Senior Advocate, appearing for the appellants and learned A.G.A. appearing for the State and perused the record.

14. It is not disputed that murder of Sukhpal (father of complainant) took place in the night of 20/21.7.1981. The place of occurrence is also not disputed. It is to be seen on the basis of the evidence adduced during trial as to whether the said murder of Sukhpal has been committed by the appellant accused who had been

held guilty and convicted by the trial court as mentioned above.

15. It is also pertinent to note that there is one eye witness of the occurrence namely Smt. Kalawati, P.W. 1, wife of the deceased who has stated about the occurrence. Another witness Vedraj, P.W. 2 is the nephew of the deceased who has stated that he saw the accused-appellant running away on motorcycle from the place of occurrence. The ocular testimony of Vedraj, P.W. 2, has been disbelieved by the trial court. Other witnesses are formal witnesses.

16. The first contention of learned Counsel for the appellants is that there remains the testimony of only one eye witness namely Kalawati, P.W. 1 who is wife of the deceased and the trial court has committed error in accepting the said testimony as wholly reliable as from the evidence on record it is abundantly clear that the presence of Kalawati, P.W. 1, at the place of occurrence is not natural and is doubtful and also even if she is taken to be present at the spot she had no occasion to see the occurrence and her testimony is not reliable at all. The contention of learned Counsel for the appellants is that in the beginning of cross examination, P.W. 1 has clearly stated that noise of "Khatpat" occurred when the accused closed the door of the Kothari and bolted from outside and she awoke only on hearing the noise of "Khatpat".

17. Thus according to learned Counsel for the appellants there was no occasion for the witness P.W. 1 to have seen the occurrence because as per the version of the FIR she awoke only after she heard noise of "Khatpat". This contention of learned Counsel for the appellant cannot be accepted. The witness P.W. 1 clearly stated in examination in chief that when she heard suppressed voice of her husband and the noise of Khatpat, she awoke and when she flashed her torch she saw that the appellant accused Amar Pal was pressing hard the legs of her husband and the appellant accused Samar Pal was pressing the chest of her husband and accused Shiv Pal, who was standing on the head side and was having a gun in his hand had put his gun on the right temple of her husband.

18. It has also been stated by the witness that accused Shiv Pal told her husband that if he will make a noise, he will be killed. When the witness enquired from the accused, as to what they were doing, her husband was shot dead by the accused-appellant and when the witness tried to make noise, she was pushed inside the Kotha and bolted from outside. The witness has clearly stated further that she saw in the torch light that two of the appellants were holding fast her husband and one of the appellants namely Shiv Pal fired shot killing her husband.

19. The witness has further stated that when she was inside the Kothari, she heard the sound of starting of motorcycle through she could not see the same but from the sound she could realise that motorcycle has gone towards Chandpur. There is nothing in the cross examination which could throw doubt on the veracity of her statement. Though during the course of argument, learned Counsel for the

appellants pointed out that the witness P.W. 1 is not a reliable witness as she had no occasion to see the occurrence but no suggestion to this effect has been given to the witness from the defence side during her cross examination. In fact from the perusal of cross examination of the witness it is clear that the witness has not been cross examined in this aspect and no suggestion has been given to her to the effect that prior to the incident she was pushed inside the Kotha and bolted from outside and she was not in a position to see the occurrence.

20. As such we are of the opinion that so far as question of seeing the occurrence by P.W. 1 is concerned, it cannot be questioned and from the evidence on record it is established that the witness Kalawati, P.W. 1 saw the occurrence and her testimony cannot be discarded on this ground. The presence of witness P.W. 1 at the place of incident and at the time of occurrence also cannot be doubted because it has been stated by the witnesses that due to shortage of accommodation, the deceased and her wife (P W. 1) used to sleep at the tubewell and that also served the purpose of looking after the tubewell in the night. Moreover, as contended by learned A.G.A., it also appears natural that the wife (P.W. 1) who was aged about 45 years at the time of occurrence, would prefer to reside with her husband during night.

21. The contention of learned Counsel for the appellants is that testimony of P.W. 1 is also liable to be assailed on the ground of human probability. According to Kalawati P.W. 1 she saw the accused-appellant holding fast her husband on the chest and legs while the third accused namely Shivpal had placed his gun on the temple of her husband and fired on him from the close range Learned Counsel for the appellant contended that this is highly improbable because of the fact that it is a case of hit and run during night and firing is alleged on a sleeping person in which single shot had been fired and there was no need for two other persons holding fast the victim especially when there was possibility of pellets hitting the two persons who were pressing hard the victim on the cot.

22. In this regard learned Counsel for the appellant has placed reliance on the decision of *Manjoor v. State of U.P.* AIR 1982 SC 96 . From the perusal of post-mortem examination report, it is clear that single fire arm injury was found on the person of the deceased. There is single wound of entry and there is corresponding wound of exit. According to the prosecution case only single shot was fired from close range by accused-appellant Shiv Pal who was having a gun in his hand. It is also the case of the prosecution that occurrence is of about 2.30 - 3.00 hours in the night when the deceased was sleeping on his cot. There was motive for accused Shiv Pal to kill the deceased. The other two accused appellants Samar Pal and Amar Pal who are alleged to have no arms had no role to play in killing the deceased at the time when the deceased was sleeping and there was no need for pressing the deceased by legs and chest especially when she was sleeping. Thus we find force in the contention of learned Counsel for appellant.

23. In our opinion the testimony of the witness P.W. 1 involving Samar Pal and Amar Pal in the commission of crime by assigning them role as mentioned in the FIR is highly improbable and unbelievable and may be the result of exaggeration hence the testimony of P.W. 1 so far as involvement of accused-appellants Samar Pal and Amar Pal cannot be relied upon but the testimony of P.W. 1, with regard to accused-appellant Shiv Pal who is alleged to have fired from his gun by placing it on the right temple of the deceased is concerned, is reliable and is accepted and the same is also corroborated by other evidence. The dead body was found on cot at the place of occurrence and the blood stained clothes of the deceased and blood stained earth has been taken in his possession by the investigating officer from the place of incident. We find that the testimony of eye witness Kalawati P.W.1 as stated above finds corroboration from the medical evidence also. The post mortem report shows that one fire arm wound of entry on the right side of the face was found on the person of the deceased and there was one corresponding exit wound which supports the prosecution story that the accused Sheo Pal fired single shot by placing his gun on the right temple of the deceased.

24. The prosecution version is also fully corroborated by the version given in the first information report that at the time of occurrence accused Sheo Pal had put his gun on the right temple of the deceased. Thus in our opinion the testimony of witness P.W.1 corroborated by the medical evidence and the first information report fully establishes that on the fateful night appellant accused Sheo Pal committed murder of deceased Sukhlal by placing his gun on his right temple. But prosecution case regarding complicity of the remaining two accused Amar Pal and Samar Pal in the commission of the said offence by attributing their role of holding fast deceased on his cot appears to be unbelievable and improbable and both the said accused are entitled to the benefit of doubt.

25. As regards the testimony of witness Begraj P.W.2, it has been contended by learned Counsel for appellant that human probabilities are to be kept in mind while evaluating the evidence and the trial court has rightly rejected the testimony of the said witness as being unbelievable. In his statement witness Begraj P.W.2 stated that in the night of the occurrence he was sleeping on the roof of his house and he got up for urinating and in the meantime he heard the noise of firing from the side of tube well and he immediately proceeded towards the same after having lathi & torch in his hand. When he reached mid way, he heard the sound of motor cycle and when he flashed the torch, he saw three persons going on motor cycle towards Chandpur and as motor cycle passed from in front of him he recognised three persons Sheo Pal, Amar Pal & Samar Pal.

26. Learned Counsel for the appellants contended that the houses of Begraj P.W.2 is about 140 paces away from the place of occurrence and the prosecution story is totally improbable that he awoke in the night for urinating and immediately proceeded towards the tubewell of deceased after hearing the sound of firing and in

mid way saw three persons going on motor cycle. Learned Counsel for the appellant contended that the incident occurred within few minutes and it is not natural and probable that the accused persons after committing murder would have stayed at the place of occurrence any longer so that the witness P.W.2 might be able to see them.

27. Learned Counsel for the appellant contended that it is against the human probabilities and such a statement can not be relied upon. There was no question of accused persons being seen on motor cycle by witness P.W.2.while running. According to learned Counsel for the appellant it has come in the evidence of the witness that there was crop standing in the fields hence there was no occasion for the witness P.W.2 to have seen accused persons running on motor cycle in the light of torch from a distance of about 70 paces (mid way).

28. Learned Counsel for the appellant has placed reliance upon the decisions given in the case of Rampukar Rai v. State of Bihar 1993 (30) S.C. 249 & State of U.P. v. Jageshwar and Ors. SC 1983 Cr.R. 297 . We agree with the contention of learned Counsel for the appellant and find that the presence of witness P.W. 2 whose house is about 140 paces away from the place of occurrence at the time of running of accused from the place of occurrence is not possible. It does not appear to be Believable that accused persons after committing murder might have stayed at the place of occurrence, as the witness P.W.2 would be able to reach there from the place of occurrence. It also does not appear to be believable that the witness P.W.2 might have awakened for urinating during night and he was able to hear noise of fire. Reality appears to be that P.W.2 might have reached at the place of occurrence much after the occurrence which is of no help for corroborating the prosecution version.

29. In view of the above, the appeal is partly allowed. So far as appeal on behalf of appellant Sheo Pal is concerned, his appeal is dismissed. His conviction and sentences awarded by the trial court are affirmed. He is on bail. Chief Judicial Magistrate, Bijnor is directed to take the appellant Sheo Pal into custody and send him to jail for serving the sentences awarded by the trial court and affirmed by us. The appeal on behalf of appellants Samar Pal and Amar Pal is allowed. They are acquitted of the charges. They are on bail. They need not surrender. Their bail bonds are cancelled and sureties are hereby discharged.

30. Office is directed to send a copy of this order to the Chief Judicial Magistrate, Bijnor within two weeks from today. The Chief Judicial Magistrate, Bijnor is directed to send compliance report of this order within two months to this court.