

(2003) 08 AHC CK 0158

Allahabad High Court

Case No: Criminal A. No. 966 of 1981

Mukteshwar and Another

APPELLANT

Vs

The State

RESPONDENT

Date of Decision: Aug. 29, 2003**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 154
- Penal Code, 1860 (IPC) - Section 300

Citation: (2004) CriLJ 1335**Hon'ble Judges:** V.N. Singh, J; U.S. Tripathi, J**Bench:** Division Bench**Advocate:** P.N. Misra and R.S. Misra, for the Appellant; A.G.A., for the Respondent**Final Decision:** Allowed

Judgement

U.S. Tripathi, J.

This appeal has been directed against the judgment and order dated 27-4-1981 passed by IV Addl. Sessions Judge, Deoria in Sessions Trial No. 243 of 1979, convicting appellants Mukteshwar (19) and Adya Pandey (20) u/s 302 read with Section 34 1PC and sentencing each of them to undergo imprisonment for life.

2. The prosecution story, briefly stated, was as under :--

Gautam Pandey (19) deceased was nephew of Chandra Shekhar Pandey (P.W. 1) and brother of Purusottam Pandey (P.W. 3). The appellants and deceased were residents of village Rupai, P. S. Khukhundu, district Deoria. A year before the occurrence of this case Mukteshwar appellant had stolen cycle of Mahadeo Bania of village Vaikunthpur. When Mahadeo demanded his cycle from Mukteshwar appellant he asked to pay Rs. 40/- to which Mahadeo agreed. The payment of above Rs. 40/- was made through Chandra Shekhar (P.W. 1). Subsequently, Mukteshwar appellant did not hand over cycle to Mahadeo, nor he refunded the money. When Gautam

deceased came to know about it he took Rs. 40/- from Mukteshwar appellant and when Mukteshwar demanded back his money he said that he had paid money to his uncle Chandra Shekhar. This had annoyed Mukteshwar appellant.

3. On the night of 20/21-3-79 at about 8.00 p.m. Chandra Shekhar (P.W. 1) Purushottam (P.W. 3) and Gautam deceased were sitting in their verandah, Appellants Mukteshwar and Adya who were pattidars came there and called Gautam deceased. They took Gautam deceased with them. At about 9.45 p.m. when Chandra Shekhar (P.W. 1) and Purusottam (P.W. 3) were going to sleep, the mother of Gautam deceased told them that Gautam deceased had not returned, nor he had taken his meals. On it Chandra Shekhar (P.W. 1) and Purusottam (P.W. 3) taking torches and dandas came to the house of appellant Adya, but he was not present at his house. Thereafter they went to the house of appellant Mukteshwar, who was also not present at his house. Gautam was also not found at the house of appellants. Chandra Shekhar (P.W. 1) and Purusottam (P.W. 3) started searching Gautam deceased. When they came to the house of Satya Dev (not examined) he told that he had seen Adya, Mukteshwar and Gautam going towards south. Chandra Shekhar (P.W. 1) and Purusottam (P.W. 3) searching the deceased went towards southern siwan (fields) along with Satya Dev. When they reached near the well of Jagannath Pandey at about 11.00 p.m. Ram Badai (P.W. 4) came there and told them that the appellant Mukteshwar, Adya and one unknown person were causing knife injuries on Gautam deceased. Chandra Shekhar (P.W. 1), Purusottam (P.W. 3), Satya Dev and Ram Badai (P.W. 4) rushed towards south and when they reached near maize and wheat fields of Ram Badai (P.W. 4) they saw the appellants Adya and Mukteshwar along with one unknown person running towards east and when they flashed their torches on them they saw that appellants and unknown person were having open knives in their hands. They chased them but they could not be apprehended. They returned to the field of Ram Badai (P.W. 4) and saw that Gautam was lying dead in the said field and there were knife injuries on his person. Chandra Shekhar (P.W. 1), Purusottam (P.W. 3) and other persons who came to the spot subsequently remained on the spot and could not come to the police station in the night due to fear. On the next morning Chandra Shekhar (P.W. 1) got prepared his report Ext. Ka-1 from Jai Prakash Pandey and came to the police station Khukhundu, where he lodged report at 11.15 a.m. Chick FIR Ext. Ka-4 was prepared by Head Constable Bal Govind Tiwari who made endorsement of the same at G.D. report Ext. Ka-5 and registered a case against the appellants and one unknown person under Sections 302 and 201 IPC.

4, Investigation of the case was taken up by Sri Paras Nath I.O. (P.W. 6). He Interrogated Chandra Shekhar (P.W. 1) at the police station and thereafter rushed to the spot. He found the dead body of Gautam deceased lying in maize and wheat fields of Ram Badat (P.W. 4) situated at village Rupai. He conducted inquest of the dead body and prepared inquest report Ext. Ka-6 and other relevant papers. He sealed the dead body and handed over to Constable Indra Jeet Singh (P.W. 5) and

Kailash Shukla for taking it for post mortem. A sweater of the deceased was also lying on the spot, which was taken into possession by the I. O. Thereafter the I.O. interrogated Purusottam (P.W. 3) and Ram Badai (P.W. 4) and other witnesses. He inspected the torches of Chandra Shekhar (P.W. 1), Purusottam (P.W. 3) and Ram Badai (P.W. 4) and found those in working order and gave in the Supardagi of its respective owner. The I.O. inspected the place of occurrence and collected blood stained and simple earth from the spot and prepared a recovery memo. He searched the appellants but they were not traceable.

5. Autopsy on the dead body of Gautam deceased was conducted on 22-3-79 by Dr. M. Zaman (P.W. 2) who found as many as six punctured wounds and six incised wounds on the person of the deceased and cause of death shock and haemorrhage as a result of ante-mortem injuries. He prepared post mortem report Ext. Ka-3.

6. The I.O. completed the remaining investigation and submitted charge-sheet against the appellants.

7. Cognizance of the case was taken by the Magistrate who committed the case to the Court of Session.

8. Both the appellants were charged with the offence punishable u/s 302 read with Section 34 IPC. They pleaded not guilty and contended that they were falsely implicated on account of enmity.

9. The prosecution In support of its case examined Chandra Shekhar (P.W. 1), Dr. M. Zaman (P.W. 2), Purusottam (P.W. 3), Ram Badai (P.W. 4), Constable Indra Jeet Singh (P.W. 5) and Paras Nath I. O. (P.W. 6).

10. The appellants examined Lalta Prasad Pandey, Lecturer Nehru Inter College, Mansa Chhappar (D.W. 1), Kalp Nath Pandey, Lecturer, Nehru Inter College, Mansa Chhappar (D.W. 2) and Ram Naresh Pandey, Pradhan of village Rupai (D.W. 3).

11. Learned Sessions Judge on considering the evidence of the prosecution held that the case of the prosecution was proved beyond reasonable doubts against the accused persons. With these findings he convicted and sentenced the appellants as mentioned above.

12. Aggrieved with their above conviction and sentence the appellants have come up in this appeal.

13. We have heard Sri P. N. Misra, learned Senior Advocate for the appellants, . learned AGA for the respondents and have perused the entire evidence on record.

14. The appellants have not disputed the death and cause of death of Gautam deceased, Sri Paras Nath Singh, I.O. (PW 6) found the dead body lying in the maize and wheat field of Ram Badai (P.W. 4) and after conducting inquest he sealed and sent the dead body for post mortem, Dr. M. Zaman (P.W. 2) who conducted the autopsy on the dead body of the deceased found following ante mortem Injuries on

his person :--

- (1) Punctured wound 1" x 1/2" x chest cavity deep on the right side chest 1" above right nipple margin clean cut.
- (2) Punctured wound 1" x 1/2" x chest cavity deep on the right side chest 1/4" lateral mid-line chest 6 1/2" below right sterno-cla-vicular joint. Margins clean cut.
- (3) Punctured wound 1/4" x 1/2" x chest cavity deep on left nipple. Margin clean cut.
- (4) Punctured wound 1/4" x 1/4" x chest cavity deep on left lateral chest 5" below left axilla. Margin clean cut.
- (5) Punctured wound 1" x 1/4" x chest cavity deep on left lateral chest just below Injury No. 4. Margin clean cut.
- (6) Incised wound 1/4" x 1/2" x muscle deep on the front part of left shoulder.
- (7) Incised wound 1" x 1/4" x muscle deep on the left arm outer side 7 1/2" below left shoulder.
- (8) Incised wound 1" x 1/2" x bone deep on right dorsum base of right middle finger. Underlying muscle and bone cut through and through.
- (9) Incised wound 1 3/4" x 1/2" x muscle deep on the right side back 1" outer mid line back 7" below right shoulder.
- (10) Incised wound 3/4" x 1/4" x muscle deep on the right buttock lower most part.
- (11) Incised wound 1 1/2" x 1/2" x muscle deep left side back just below left shoulder border.
- (12) Punctured wound 1" x 1/2" x chest cavity deep on the left axilla inner and upper part, margins clean cut.

He further stated that internal examination showed that right lung was congested and showed cut marks at two places. Left lung was also congested. Pericardium congested and cut. Both chambers of heart were empty and showed through and through puncture at its lower part near apex, size 1/4" x 1/10". Chest cavity contained clotted blood about 400 ml. Stomach contained semi-digested food, rice, dal and vegetables about 200 grams. The cause of death was shock and hemorrhage as a result of injuries received during life.

The above medical evidence has not been challenged. Therefore, the prosecution has established death and cause of death of Gautam deceased.

15. It is also not disputed that the occurrence took place in the maize and wheat fields of Ram Badai (P.W. 4), somewhere in the night of 30/31-3-1979. The I.O. found the dead body of deceased lying at the said place. He also found blood on the spot. On the scene of occurrence, the maize crop was damaged, and the leaves of maize

plants also contained blood stains. The above date time and place of the occurrence are also not disputed.

16. Learned counsel for the appellants contended that there is inordinate delay in lodging the FIR and it was also ante time and it shows that none had seen the occurrence, the dead body of the deceased was noticed in the morning and, therefore, the report was lodged making it ante time. That the conduct of the ocular witnesses shows that they had not seen the occurrence. The presence of P.W. 1, P.W. 3 and P.W. 4 on the spot is doubtful and ocular testimony is in contradiction with the medical evidence.

17. The occurrence as alleged by the prosecution and stated by Chandra Shekhar (P.W. 1), Purusottam (P.W. 3) and Ram Badai (P.W. 4) took place at about 11.00 p.m. The report of the occurrence was lodged at 11.15 a.m. on the next day. The distance of police station was only seven kilometers. Thus, the report was lodged after 12 hours 15 minutes. The informant Chandra Shekhar (P.W. 1) tried to explain the above delay in lodging the report and stated that he could not come to police station during night due to fear and that in the morning he got prepared report from Jai Prakash Pandey. In his cross-examination he admitted that the police station is situated at the distance of six miles from his village. Up to a distance of one mile there was kachchl road and he travelled above distance on foot. Thereafter he took a rickshaw and proceeded on it. The rickshaw got punctured in the way and, therefore, he was delayed in reaching the police station. Purusottam (P.W. 3) stated in his cross-examination that his uncle Chandra Shekhar left the spot and went to the house at 6.00 to 6.30 a.m. In the FIR Ext. Ka-1 there is no explanation for delay in lodging the report. In his evidence Chandra Shekhar (P.W. 1) had also not given any explanation. In his cross-examination he offered the above explanation. He also admitted that he had not mentioned the above explanation in the FIR, nor had stated before the I.O. It appears that when specifically asked about the delay the witness gave a false excuse in lodging the report with delay and introduced a theory that rickshaw on which he was going to police station got punctured in the way. This explanation was subsequently developed and is not convincing. The delay in lodging the report in the facts and circumstances of the case leads to infer that the dead body of the deceased was noticed for the first time in the morning as stated by Ram Naresh Pandey (D.W.I), Pradhan of the village and thereafter Chandra Shekhar was called from his house and then he went to the police station. Had it not been so and the informant and other witnesses had seen the occurrence in the night at about 11.00 p.m. and the name of the assailant was known the report in all probabilities would have been lodged at 6.00 or 7.00 a.m. if not earlier to it. The delay in lodging the report again suggests that deliberations were going on as to who should be made accused.

18. In the FIR it was mentioned that the appellants committed murder of deceased on account of old enmity. That enmity was not given in the FIR. However, in his

evidence Chandra Shekhar (P.W. 1) set up a case that appellant Mukteshwar had stolen a cycle of one Mahadeo Bania a year before the occurrence of this case and when Mahadeo Bania demanded the cycle from him he asked to pay him Rs. 40/-. The above payment was made by the witness. Subsequently the appellant neither gave cycle, nor refunded the money to Mahadeo. Gautam deceased took Rs. 40/- from Mukteshwar under some pretext and adjusted it towards the above amount. Thus alleged enmity was developed in the evidence. In his cross-examination Chandra Shekhar stated that Gautam deceased had taken money from Mukteshwar 2-3 months before the occurrence, but thereafter the appellants and Gautam deceased were used to move together and no altercation had taken place between them. Purusottam (P.W. 3) also admitted in his cross-examination that prior to the occurrence Gautam deceased and the appellants used to move in the night up to 8-9 p.m. This shows that there was no enmity between the appellants and the deceased and the motive alleged is very weak. However, since the prosecution has relied on the ocular testimony absence of motive is of no consequence.

19. To prove its case the prosecution has relied on the ocular testimony of Chandra Shekhar (P.W. 1), Purusottam (P.W. 3) and Ram Badai (P.W. 4). According to evidence of Chandra Shekhar (P.W. 1) and Purusottam (P.W. 3) while they were searching Gautam deceased in the night of occurrence they went to the well of Jagannath towards south of village Abadi near well of Jagannath Ram Badai (P.W. 4) came there running and told that the appellants and one unknown person were causing knife injuries on the deceased in his maize and wheat fields. On his above information that above two witnesses along with Ram Badai (P.W. 4) and one Satya Dev proceeded to the said place and saw the appellants running away with open knives. This shows that on the information given by Ram Badai (P.W. 4), Chandra Shekhar (P.W. 1) and Purusottam (PW 3) went towards the place of occurrence. We have to consider whether Ram Badai was present on the spot and had seen the occurrence first.

20. Ram Badai (PW 4) claims that on the night of occurrence at about 11.00 p.m. he was watching his maize Corporation. He heard talks of the persons towards the east of his field. At that time he was on the north eastern corner of his field. He flashed his torch and saw that Mukteshwar, Adya and one unknown person were present there. The unknown person had caught hold of Gautam deceased and Mukteshwar and Adya were inflicting knife blows on him. Gautam rushed towards the witness, but the witness out of fear ran towards village and met Chandra Shekhar (P.W. 1), Purusottam (P.W. 3) and Satya Dev at the well and told them what he had seen. He admitted in his cross- examination that he had gone to his maize field prior to 25 minutes of the occurrence. He had not made any hut or other thing in the field. He also admitted that the maize crop was up to the height of three feet only. It means that the maize crop was not ripe and corns have not developed in the plants. Usually maize crops are watched when corns developed in the plants. As such on the night of occurrence there was no occasion for Ram Badai (P.W. 4) to have watch on his

maize crop till 11.00 p.m. He has also not given any special reason for watching the maize crop, which was at the initial stage. The spot situation shows that there were other fields of the persons having wheat and other crops, but the owners of the above fields were not watching their fields. As such there was no danger of theft or damage of crop by the cattle in the said Siwan."

21. Ram Badai (P.W. 4) further stated that when he heard the talks of persons he was at north eastern corner of his field. It appears that the assailants had chosen odd hours of night and a lonely place for committing murder of the deceased and in case Ram Badai (P.W. 4) was present at his field the appellants must have noticed his presence and they would have not chosen his field to commit murder of the deceased. These improbabilities in the evidence of Ram Badai leads to infer that he had no occasion to be present on the spot and, therefore, was not in a position to see the occurrence.

22. According to the evidence of Chandra Shekhar (P.W. 1) and Purusottam (P.W. 3) they came to know about the assault on the deceased only when Ram Badai (P.W. 4) told to them near the well of Jagannath Pandey. The evidence of Ram Badai (P.W. 4) shows that he saw the assailants causing knife blows on the deceased and thereafter ran towards village Abadi and met with Chandra Shekhar (P.W. 1) and Purusottam (P.W. 3) near the well. The medical evidence shows that as many as 12 punctured and incised wounds were caused on the deceased. The I nature and seat of injuries show that in all I probabilities the deceased must have raised alarm at the moment the assailants started causing injuries on him. The well of Jagannath is at a distance of 150 yards from the place of assault as shown in the site plan and if Chandra Shekhar (P.W. 1) and Purusottam (P.W. 3) were present at the well they would have easily heard the shrieks of the deceased and would have rushed towards the place without waiting for the information by Ram Badai (P.W. 4). It further shows that in case Chandra Shekhar and . Purusottam were present at the well when the first blow was caused on the deceased they would have rushed to the place of occurrence and in such a position as many as 12 injuries could not have been caused to the deceased and these witnesses would have been in a position to observe actual assault, but on their own showing they had not seen the actual assault but had seen the appellants and one unknown person running from the spot with open knives in their hands.

23. The above improbabilities in the evidence of the ocular witnesses leads to infer that they had not seen the occurrence and it appears that since the appellants were close friends of the deceased and the deceased used to roam in their company, they might have suspected that the murder of deceased was committed by the appellants, but the suspicion howsoever, strong, cannot take place of the evidence. In view of the above discrepancies and improbabilities no reliance can be placed on the evidence of the ocular witnesses.

24. Appellant Adya had set up plea of alibi and had examined Lalta (D.W. 1) and Kalp Nath (DW 2) the teachers of Nehru Inter College, Mansa Chhapar to prove that on the night of occurrence he was present at Semara Kath Kuiyan as he had to appear in Intermediate Final Examination and the examination center was Shri Krishna Inter College, Semara Kath Kuiyan. Since the evidence of ocular witnesses itself is not reliable we need not consider the above plea of alibi.

25. In view of our above discussions and observations we find that ocular witnesses Chandra Shekhar (P.W. 1), Purusottam (P.W. 3) and Ram Badai (P.W. 4) are not reliable and their presence on the spot is doubtful. Therefore, their evidence is not worthy of credence and the prosecution has failed to establish the guilt against the appellants. Thus, the appeal succeeds.

26. The appeal is accordingly allowed. Conviction and sentence of appellants are set aside and they are acquitted of the offence for which they were tried. They are on bail. Their bail bonds are cancelled and sureties are discharged. They need not surrender.