

**(1996) 03 AHC CK 0099**

**Allahabad High Court**

**Case No:** Criminal Appeal No. 2947 of 1981

Shashi alias Satender and  
Another (In Jail)

APPELLANT

Vs

State of U.P.

RESPONDENT

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**Date of Decision:** March 25, 1996

Acts Referred:

- Penal Code, 1860 (IPC) - Section 302, 34

Hon'ble Judges: R.N. Ray, J; N.L. Ganguly, J

Bench: Division Bench

Advocate: G.S. Chaturvedi, P.K. Tewari and S.C. Tewari, for the Appellant; D.G.A., for the Respondent

Final Decision: Allowed

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### **Judgement**

N.L. Ganguly, J.

Two Appellants Shashi alias Satender and Ram Pal have been convicted u/s 302 read with Section 34, I.P.C. and sentenced to life imprisonment in Session Trial No. 186/81 by the Court of IInd Additional Sessions Judge, Bulandshahr. The F.I.R. and the evidence led in the case shows that one Tej Pal Singh owned 54 bighas of agricultural land at village Ahmadnagar, P.S., B. B. Nagar, district Bulandshahr. Deceased Digamber Singh was the son of Tej Pal Singh. The Appellant Shashi alias Satender is the son of Digamber Singh. Appellant No. 2 is said to be the friend of Shashi alias Satender Appellant No. 1

2. The prosecution case is that the Appellant Shashi alias Satender was naughty person. He was separated from the family after giving him 18 bighas of land for cultivation. The remaining land out of 54 bighas was kept joint for Digamber Singh (deceased), his father Tej Pal Singh and the informant Gyanendra (P.W. 1). It is alleged that Digamber Singh had negotiated for selling 5 bighas land to one Bheem Singh. Appellant Shashi was annoyed. It is said that the land was to be sold on

23.2.81 but on account of advocates strike the same could not be executed and its execution was postponed to 24.2.81. In between 23/24.2.81 between 11.00 and 12.00 in the night, Digamber Singh (Deceased), his father Tej Pal Singh and the informant Gyanendra (P.W. 1) were present at their tube-well which is situated at a distance of one furlong from the abadi of the village. The complainant was a student and on that hour in the light of tubewell on a pole, he was reading. Digamber Singh (Deceased) was lying near him when Appellants Shashi and Rampal armed with boori and knife respectively came and assaulted Digamber Singh with boori and knife. The complainant ran away towards the village on seeing the occurrence raising alarm. In the course of assault, Tejpai Singh had tried to save and intervene and he was also assaulted by the weapons of the Appellants. He had received injuries. It was a night hour. The informant could not go to the police station for lodging the report immediately. On the next day at about 9.30 a.m.. Gyanendra (P.W. 1) reached the police station and lodged the F.I.R. which have been proved and marked as Ext. Ka-4.

3. In this case the prosecution examined the solitary eye-witness Gyanendra (P.W. 1). Tejpai Singh who also said to have received injury by the hands of assailant was not examined in the Sessions Court. The prosecution examined the witness Bhuley Ram (P.W. 2) who had accompanied with the dead body to the mortuary, P.W. 3 is the head constable Chandrajit Singh who registered the case and prepared chik report. Dr. S. K. Datta (P.W. 4) had examined the injury of Tejpai Singh. The post mortem examination of the deceased Digamber Singh was conducted by Dr. M. P. Agarwal (P.W. 5). Anti-mortem injuries on the dead body are quoted from the post mortem report as under:

1. Penetrating wound left eye ...? 2 cm. x 1 cm. cavity deep.
2. Incised wound 3 cm. x 0.5 cm. muscle extending from Burigge of nose to...left eye.
3. Incised wound 2 cm. x 0.5 cm. x muscle Rt. side nose.
4. Incised wound 3 cm. x 1 cm. muscle side chin.
5. Incised wound ...1/2 cm. x 2 cm... Rt. side neck..? All muscle deep...? 2 cm. x 0.5 cm muscles 3 cm. x 1 cm.
6. Four incised wound Lt. side front neck each about 1 cm apart, all muscle deep. Size maximum 1 cm. x 0.5 cm. muscle 3 cm. x 1 cm.
7. Incised wound 3 cm. x 2 cm. x Trechee cut through and through and middle.
8. Penetrating wound 0.5 cm. x 0.5 cm. x muscle Rt. side front of over chest 4 cm. below.
9. Incised wound Rt. side front of chest 1 cm. x 0.5 cm. x muscle...?

10. Abrasion wound left side of chest 9 cm. x below nipple 2 cm. x 1 cm.
11. Four incised wound 3 cm. above verticles on Dorsum both side all muscle deep, each about 2 cm. apart. Size muscles 1 cm. x 0.5 cm. maximum 2 cm. x 1 cm.
12. Three incised wound 4 cm. below verticals on abdomen each muscle deep. Size 1 cm. x 0.5 cm. to 2 cm. x 1 cm.
13. Two penetrating wound on...? Lower part, each cavity deep size 1 cm. x 0.5 cm. wound deep.
14. Incised wound three in number all muscle in deep 0.5 cm. x 0.2 cm., on penis two on Lt side and one on dorsum.
15. Two incised wound on each lower part...? rages cut 1 cm. x 0.5 cm. x muscle.
16. Incised wound 1 cm. x 0.5 cm. x muscles Rt. Buttock.
17. Incised wound 1 cm. x 0.5 cm. Rt side rents No. 1 rages.
18. Muscle ...? Rt glater rages in area 1 chest 7 in number 8 cm. x 4 cm.

The injuries of Tejpal Singh which were examined by Dr. S. K. Datta are reproduced as under:

Incised would 3 1/2cm x 3/4 cm. x muscle deep over dorsum of feet 3 cm. anterior to lateral malleolus of Tibea. Margins are sharp.

Nature simple, Duration fresh caused by sharp edged weapon.

4. It is worth noting that the injuries of Tejpal Singh was examined at 3.20 p.m. on 24.2.81 and the duration in the injury report is said to be fresh. In the examination-in-chief, the witness Dr. S. K. Datta (P.W. 4) stated that the injuries on Tejpal Singh could not be caused in between the night 23/24.2.81.

5. The prosecution adduced evidence of P.W. 6, Ishwar Dayal Tyagi, the Investigation Officer.

6. Heard Sri A. D. Giri. learned Counsel for the Appellants and Sri K. C. Saxena, learned A.G.A. and perused the record.

7. Sri A. D. Giri submitted firstly that the F.I.R. in this case is not reliable and is falsified by the injury report of Tejpal Singh. He submits that if Tejpal Singh had really received injuries in the incident as put forth by the prosecution, then the position would not have come as has been stated by P.W. 4 Dr. S. K. Datta. If Tejpal Singh had not received injuries in the occurrence which took place in between the night of 23/24.2.81 in between 11.00 and 12.00 p.m. as disclosed by the prosecution, then the sanity and correctness of the F.I.R. becomes doubtful. Learned Counsel for the Appellants cited the decision Marudanal Augusti v. State of Kerala 1980 SCC 985. In that case, the Hon"ble Supreme Court was considering a similar controversy. It

was urged before the Hon"ble Supreme Court that a F.I.R. which contains graphic details of the entire occurrence and care has been taken not to omit even the minutest detail. The names of P.Ws. 4, 5 and 6 as having witnessed the assault was not named in that F.I.R. even though P.Ws. 2 and 3 were mentioned in the F.I.R. as having given first aid to the deceased alongwith the informant, it is nowhere mentioned that these two witnesses were also present when the deceased was actually assaulted. According to the allegation made in the F.I.R., the attack on deceased was a sudden and short one and was not likely to have been noticed by anybody unless he was present there. The most serious infirmity which appears in the case is that although the F.I.R. was lodged on the midnight, it was dispatched to the Sub-Magistrate and was received by him on the next day at 5.30 a.m. There was a delay in receipt of the F.I.R. by the Sub-Magistrate. Further, the Supreme Court referred to the statement of the doctor who had testified that the injury was simple one and fresh which was taken to be on account completely knocking the bottom of the prosecution case regarding the circumstances in which the F.I.R. was lodged. In that case the Hon"ble Supreme Court was of the view that the High Court had overlooked the fact that the entire fabric of the prosecution case is clearly held to be fabricated and brought to the existence long after the occurrence and any witness could be added without any thing to check the authenticity of the case. In view of these observations the Supreme Court has discarded to rely on that case.

8. In the present case, the factum of presence of Tejpal Singh at the time of the occurrence and receipt of the injury on his person itself become doubtful in view of the injury report and categorical statement of Dr. S. K. Datta (P.W. 4).

9. In this case, another aspect also requires to be considered which is the motive. Learned Counsel for the Appellant submitted that the evidence in the case shows that the Appellant Shashi was a vague one on account of his conduct was not lying by his family members, father and grandfather. The father of the Appellant, namely, Digamber Singh had negotiated to transfer 5 bighas land to one Bheem Singh and the sale-deed was not executed on account of Advocates" strike on 23.2.81, as such it was submitted that the execution of the sale-deed was postponed. The prosecution has not laid any evidence to show that the deed was prepared or draft was prepared nor any evidence has come to show that any particular land was going to be sold to Bheem Singh. The entire Khata of 54 bighas out of which the said 18 bighas was given to the Appellant Shashi was not separated nor any mutation in his name was done. The entire Khata of 54 bighas is in the name of Tejpal Singh. The mutation part could have been established by examining Bheem Singh who could have made statement positively which was not done in this case. Tejpal Singh, the grandfather of the Appellant Shashi and the informant Gyanendra was most important person who could state the correct fact of the case before the court but they are not examined as witnesses.

10. Learned Counsel for the Appellant submitted that Tejpal Singh, the grandfather of the Appellant No. 1 at the time of the occurrence was already 80 years of age. Digamber Singh had been killed. The only person who could get the land was the P.W. 1 Gyanendra who was at that time only 14 years and a few months of age. Learned Counsel for the Appellant submitted that it appears that the village party-bandi is there and persons are interested to garb the property of a minor. If he gets the property, the persons interested to garb the property attempted to put Appellant in jail, their entire game was likely to succeed. The argument cannot be said to be without basis but on such argument only and on the basis of suggestion made to the witnesses cannot be made the basis of recording a finding of acquittal. The prosecution case has to be examined and the case would succeed or fail only on the basis of the prosecution evidence and not on such oral suggestion.

11. After considering the arguments and perusal of record, we are not inclined to accept the solitary testimony of P.W. 1 Gyanendra whose presence at the tube-well at the time between 11.00/12.00 in the night of 23/24.2.81 saying that he was studying there cannot be implicitly believed. The statement of the witness Gyanendra (P.W. 1) that his mother was paralysed and was at the home. There is no other evidence and there were no other family members to look after the lady ailing wife of Digamber. In fact, it has been stated by Gyanendra that it is the informant Gyanendra and deceased Digamber who used to look after the ailing mother of the complainant. Thus it also does not appear to reason as to why the person would be at a distance in the night leaving the ailing mother in the house alone. After examining the evidence on record, we are of the view that the prosecution evidence cannot be accepted and believed. The benefits of lacuna of prosecution are to be given to the Appellants. The Appellants are thus entitled to be given benefit of doubt.

12. In the result the appeal is allowed. The Appellants conviction and sentence are set aside. The Appellants are on bail. They need not surrender and their bail bonds are discharged.