

(2007) 08 AHC CK 0231**Allahabad High Court****Case No:** None

Chaman and Dildar

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: Aug. 10, 2007**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 300, 302, 304, 34
- Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 3

Hon'ble Judges: Saroj Bala, J; Imtiyaz Murtaza, J**Bench:** Division Bench**Final Decision:** Dismissed**Judgement**

Imtiyaz Murtaza, J.

The present appeal is directed against the judgment and order dated 2.5.2006 passed by Special Judge (S.C/S.T.P.A. Act), Etah in Session Trial No. 574 of 2002 whereby the appellants are convicted u/s 302/34 I.P.C and sentenced to undergo imprisonment for life and a fine of Rs. 5000/- and further convicted u/s 3(2)(5) of S.C/S.T. (P.A.) Act and sentenced to undergo imprisonment for life and a fine of Rs. 5000/-. Both the sentences were directed to run concurrently.

2. Briefly stated, the prosecution case is that marriage of Mahesh Chand was going to be solemnized in village Raja Ka Rampur and several persons of village Aliganj reached in village Raja Ka Rampur to attend the marriage. At about 11 p.m. on 16.3.2002 when the marriage party was reaching bride's house the appellants started dancing in the party, which was objected by the people but they did not pay any heed, which resulted in a scuffle between the appellants and the deceased. Thereafter, appellants went to their house and returned and Dildar stabbed Mukesh with a knife on his chest while Chaman was catching hold of him. Mukesh succumbed to his injuries while he was being carried to the Hospital for treatment.

The report of the incident was lodged by one Alakh Saran at the police station.

3. After the registration of the case S.I. Sita Ram Shukla reached at the place of occurrence. He prepared the inquest memo and handed over the dead body in a sealed condition to Constables Sri Niwas and Omveer Singh for carrying it to the mortuary for post mortem examination. The inquest memo is Ext. Ka. 2. Photo lash, challan lash, letter to C.M.C. are Lxts. Ka. 3, Ka. 4 and Ka. 5 respectively. He collected blood smeared and plain earth from the place of occurrence and prepared its recovery memo, which is Ext. Ka. 6.

4. Post-mortem on the dead body of Mukesh was conducted by Dr. V.K. Dubey and noted following ante-mortem injuries:

1. Incised wound 3.0 cm x 1.0 cm x chest cavity deep on (Lt.) side chest, 6.0 cm away (Lt.) nipple at 8"0 clock position. Tailing downwards.

2. Abrasion on back of (Rt.) forearm 7.0 cm proximal to wrist joint size 2.5 cm x 1.0 cm.

3. Linear abrasion on (Rt.) side back at superior border of scapula 7.0 cm long.

5. In the opinion of the doctor the cause of death was due to shock and haemorrhage as a result of ante mortem injuries.

6. After submission of the charge sheet, the case was committed to the court of Sessions and charges u/s 302/34 and 3(2)(v) of S.C.S.T. Act were framed against both the appellants to which they denied and claimed trial.

7. The prosecution in support of its case had examined 4 witnesses.

8. The case of the defence was of denial and false implication and they did not examine any witness in their defence.

9. The Sessions Judge after considering the evidence on record convicted the appellants, as aforesaid. Hence this appeal.

10. We have heard learned Counsel for the appellants and the learned A.G.A. for the State.

11. The counsel for the appellants has challenged the findings of the trial court on various grounds. It was argued that the presence of both the eye witnesses at the place of occurrence is highly doubtful. The eye witnesses have failed to fix the place of occurrence and there are contradictions in their testimonies to describe the place where actually murder took place. It was further argued that the eyewitnesses had no occasion to know their identity and the appellants were also not put up for identification. The counsel for the appellants submitted that the prosecution did not examine any witness of the vicinity. Lastly, it was submitted that on the basis of the evidence on the record no offence u/s 302 I.P.C. is made out against the appellants.

12. In order to appreciate the submissions we have to examine the evidence of the prosecution.

13. P.W. 1 Kanhaiya Lal deposed that about 3 years back he came to Aliganj to attend the marriage ceremony (Barat) of Mahesh Chandra. When the Barat was reaching near the house of bride at about 1 1.00 P.M., (human and Dildar also reached there and started dancing. The members of the marriage party (Barat) stopped them from dancing. They did not pay any heed and scuffle took place between the accused and the members of the marriage party. Both of them went to their house and brought a knife. Chaman caught hold of Mukesh while Dildar stabbed Mukesh. He was also present in the marriage party Several other persons including Jaiveer and Rakesh had identified the accused in the Gaslight and electricity. Both the accused fled away after committing the murder.

14. P.W. 2 Jaiveer deposed that marriage party of Mahesh had come in Mohalla Marhiya Chauraha Raja Ka Rampur. He also attended the marriage. At about 12.00 O'clock in the night Barat was reaching at the house of bride. In the marriage party some boys were dancing. Chaman and Dildar also started dancing in the marriage party. He knew Chaman and Dildar from before as he used to go to Raja Ka Rampur. Both of them were hawkers. The person who were present in the Barat stopped Chaman and Dildar from dancing but they did not pay any heed. Mukesh also stopped them, which resulted in scuffle. Chaman and Dildar went to their house. He further deposed that when they reached near the house of Sushil, Chaman was catching hold of Mukesh and abusing him. Dildar was carrying a knife and he caused injury of knife on the chest of Mukesh. The accused after inflicting injury fled away towards Rudayan. They could not be apprehended. While they were taking Mukesh for medical treatment he died at the place where the marriage party was taking dinner. They identified the accused persons in the electric light. The dead body of Mukesh was kept by the load side. Alak Saran had lodged the report at the police station.

15. P.W. 3 Dr. V.K. Dubey conducted the post-mortem examination.

16. P.W. 4 Sub Inspector Sita Ram Shukla is the investigating officer of the case and after conclusion of the investigation he submitted charge sheet against the appellants.

17. The first submission of the counsel for the appellants is that the presence of P.W. 1 Kannahiya Lal and P.W. 2 Jaiveer at the time of occurrence is highly doubtful and both these witnesses were resident of Aliganj and no witness of the place of occurrence has been examined.

18. We do not find any substance in this submission because the. witnesses have explained their presence. They deposed that they were attending the marriage of Mahesh Chandra and the occurrence took place at the time when marriage party was reaching at the house of bride and accused persons started dancing there. This

was objected to and resulted in the scuffle. There is no reason to disbelieve their presence at the time of occurrence. The prosecution could not examine the informant Alakh Saran in this case because before recording of his evidence in the case he expired. So far as the non examination of witnesses of locality is concerned it has been held in the case of Appa Bhai v. State of Gujarat reported in 1998 SCC 241 by the Apex Court that "experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its ditties. "The court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability, if any, suggested by the accused."

19. The counsel for the appellant has challenged that the prosecution has failed to prove the place of occurrence. It was submitted that different witnesses have described different places of occurrence. P.W. 1 deposed that the murder took place at the main road going towards Aliganj and not in a lane and the murder took place 10 meters away from Mandhiya Chauraha. P.W. 2 deposed that the murder took place in a lane of Aliganj Road and the lane was about 2 hands wide. P.W. 4 stated that the place of occurrence was near Mandhiya Chauraha. The dead body was found on the road going towards Sadayan Railway Station from Mandhiya Chauraha. We do not find any substance in the submission that the prosecution failed to prove the place of occurrence. The occurrence took place in village Raja Ka Rampur. P.W. 1 Kanhaiya Lal and P.W. 2 Jai Veer are residents of Aliganj. Both have explained their presence that they came to attend the marriage and it is also not disputed by the defence. The occurrence took place on 16.3.2002 and they were cross examined after about 3 years. The prosecution case is that the witnesses were in the marriage party. The accused started dancing in the marriage party. It was deposed that when they were stopped they started quarreling with deceased and went to their house. In the meantime the deceased alongwith P.W. 2 went to the house of sister of the deceased and while they were returning from there the accused persons had assaulted the deceased. The witnesses have deposed that after sustaining the injury they were carrying Mukesh for treatment and he succumbed to his injuries where the marriage party was taking meals. Thereafter, the dead body was kept at Mandhiya Chauraha. This testimony looks very natural because in the marriage no body would like to keep the dead body in his house, therefore, shifting of dead body cannot be said to be suspicious. In such a situation if there are some variations in their description about the exact place of occurrence then it cannot be termed as infirmity in the prosecution case. It is also important to

mention that the main dispute arose between the parties at Mandhiya Chauraha. Some quarrel had also taken place at that time when the accused were stopped from dancing. In such a situation it is very difficult to describe the exact place of occurrence. The witnesses due to some confusion in the cross examination have committed mistake in describing the actual place of occurrence. In our opinion, these are only normal discrepancies occurred because the witnesses are resident of different village and their testimonies were recorded after lapse of 3 years and on that account their evidence cannot be rejected. The Apex Court in the case of Syed Ibrahim v. State of A. P. reported in (2001) SCC 34 has held that "normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there. However, honest and truthful witness may be. Material discrepancies are those which are not normal and not expected of a normal person, the courts have to label the category to which the discrepancy may be categorised. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so." In the instant case the place of occurrence consist of several places and the witnesses are residents of different villages and they may not be very conversant with the topography of the area and the time of occurrence is also mid night, therefore, the errors committed by the witnesses in describing the place of occurrence only come under normal discrepancy and on that ground otherwise trustworthy and reliable evidence cannot be discarded.

20. The eyewitness account is consistent about the weapon of assault. The origin of the incident is also described in a very truthful and natural manner. There is no suggestion as to why these witnesses are falsely deposing against the appellants.

21. The next submission of the counsel for the appellants is that the witnesses were resident of different village and they were also not previously known and in such a situation identity of the accused cannot be fixed without identification parade.

22. We do not find any substance in this submission because all the witnesses had identified the accused in the court and they had also described the manner of assault and role of the accused. Both the eye witnesses are mentioned as witnesses in the first information report. Mere failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The Apex Court in the case of Simon and Others Vs. State of Karnataka, has held that "The purpose of prior test identification is to taste and strengthen the trustworthiness of the evidence, courts generally look for the corroboration of the sole witness in court so as to fix the identity of the accused who are strangers to them in the form of earlier identification proceeding. This rule of prudence however, is subject to exception, when for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration."

23. Moreover, P.W. 2 Jaiveer stated that Chaman and Dildar were previously known to him because he used to visit Raja Ka Rampur and both were hawkers by profession. In view of the above there is no doubt about the identity of the accused.

24. Lastly it was submitted that in the facts and circumstances of the case, the Sessions Judge wrongly convicted the appellants u/s 302 I.P.C. and further submitted that appellant Dildar had said to have inflicted a single blow on the deceased Mukesh and the act of Dildar would not amount to murder. In support of his submission learned Counsel place reliance on decisions of the Apex Court in the cases of Abdul Kadar Mansurmiya Malek v. State of Gujarat reported in 1998 SCC 569, State of U.P. v. Hari Om reported in (1989) SCC 63 , Balbir Singh, etc. Vs. State of Punjab, etc., where the conviction was altered by the Apex Court from 302 I.P.C. to 304 (I) or 304 (II) I.P.C.

25. The post-mortem of the deceased Mukesh shows that he sustained one incised wound 3 Cm. x 1 Cm. X chest cavity on left side chest 6 cms. away left nipple at 8 O'clock position, ailing present. On dissection the doctor noted that heart was cut through full thickness anteriorily. The causing of this injury was attributed to Dildar and it was sufficient in the ordinary course of nature to cause death.

26. There is no justification for the assertion of the counsel for the appellant that the inflicting of solitary blow resulting in the death of the deceased should be reduced to culpable homicide not amounting to murder. The Apex Court in the case of Pulicherla Nagaraju @ Nagaraja Reddy Vs. State of Andhra Pradesh, has held as under:

Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls u/s 302 or 304 Part I or 304 Part II. Many petty or insignificant matters--plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable u/s 302, are not converted into offences punishable u/s 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable u/s 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances: (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any

premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases, which may throw light on the question of intention. Be that as it may.

27. In the facts and circumstances of this case prosecution has proved that after the scuffle of the appellants with the deceased they went to their house and returned carrying a knife and appellant Dildar intentionally inflicted fatal blow on the vital part of the body of the deceased resulting in extensive internal damage and the injury was sufficient in the ordinary course of nature to cause death therefore, the appellant is liable for committing the murder of the deceased.

28. In view of the above, the case of the appellant Dildar is covered under thirdly of Section 300 I.P.C. and he is liable to be convicted u/s 302 I.P.C.

29. So far as the role of the appellant Chaman that he caught hold of the deceased while Dildar inflicted fatal injury is concerned, he can be attributed with the knowledge that the injury would likely to cause death and in our opinion he is liable to be convicted u/s 304(1) I.P.C. and sentence of 10 years imprisonment would meet the ends of justice.

30. Now the question arises whether the Sessions Judge has rightly convicted the appellants u/s 3(2)(5) of S.C.S.T. Act and sentenced to life imprisonment? Perusal of the entire evidence on record indicates that the incident took place in a marriage party where after some scuffle appellants committed the murder of the deceased. Nothing has been brought on record by the prosecution, which attracts the provisions of Section 3(2)(5) of S.C.S.T. Act against the appellants. In view of the above in our opinion the Sessions Judge has wrongly convicted and sentenced the appellants u/s 3(2)(v) and the appellants are acquitted of the charge u/s 3(2)(v) of S.C./S.T. (P.A.) Act.

31. For the reasons stated above, the appeal of appellant Chaman is dismissed with the modification that conviction of appellant Chaman u/s 302/34 I.P.C. is altered to u/s 304(1) I.P.C. and he is sentenced to 10 years imprisonment. The conviction and sentence of appellant Chaman u/s 3(2)(5) of S.C.S.T. is set aside. The appellant is on bail. C.I.M. Etah is directed to take the appellant into custody forthwith and send him to Jail for serving the sentence awarded by the trial court and modified by us.

32. Criminal Appeal of appellant Dildar is dismissed with the modification that while the order of conviction and sentence of the appellant Dildar under Sections 302/34 I.P.C. awarded by the trial court is upheld, the conviction and sentence of appellant Dildar u/s 3(2)(5) of S.C.S.T. is set aside. The appellant Dildar is in jail. He shall be

kept there to serve out the sentence awarded by the trial court and affirmed by us.

33. Office is directed to communicate this order to the court concerned within 15 days for compliance.