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**(2003) 08 AHC CK 0188**

**Allahabad High Court**

**Case No:** Criminal Appeal No. 1887 of 1990

Jai Prakash alias Golku

APPELLANT

Vs

State of U.P.

RESPONDENT

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**Date of Decision:** Aug. 5, 2003

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 302, 325

**Citation:** (2003) 3 ACR 2939

**Hon'ble Judges:** U.S. Tripathi, J; D.P. Gupta, J

**Bench:** Division Bench

**Advocate:** A.D. Giri, V.C. Tiwari and Shashank Shekhar, for the Appellant; Ravindra Singh, Shamimul Husnain, Rekha Jaiswal and Amarjit Singh, A.G.A., for the Respondent

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**Judgement**

1. The Sessions Judge, Basti, vide his judgment and order dated 1.8.1990 passed in S.T. No. 236 of 1989, State v. Jai Prakash alias Golu, u/s 302, I.P.C., P. S. Chiliha, district Siddhartha-nagar, convicted and sentenced the accused-Appellant Jai Prakash to undergo imprisonment for life u/s 302, I.P.C.

2. Feeling aggrieved the present appeal was preferred by the Appellant.

3. The facts giving rise to this appeal can be narrated in brief as under:

The complainant P.W. 1, Smt. Barfa Devi, was the wife of Lavkush (deceased). Ambika and Chandrika Nath were real brothers. Chandrika had no issue. Ambika was the father-in-law of complainant Smt. Barfa Devi. Ambika had two sons, Jhanna and Lavkush. The accused-Appellant Jai Prakash and other accused Prem, who had absconded, were the sons of Jhanna. Deceased Lavkush had three sons Janardan, Shatrughan and Asthadev. Janardan was employed in Jamshedpur while Shatrughan was employed in Airlines at Nasik. Asthadev was residing with Lavkush and Barfa Devi in village Malpar, Police Station, Chiliha, district Siddharthanagar. About 14-15

years before the occurrence of this case Chandrika, who was issueless, executed a will-deed of his property in favour of the three sons of Lavkush (deceased). A litigation followed, in which the accused Jai Prakash was unsuccessful. It happened about 11 years before the occurrence. Jai Prakash, after losing the case outwardly did not exhibit any enmity but in his heart he was nursing grudge with the family of Lavkush. In the month of February, 1989, Jai Prakash murdered Shatrughan, the son of the complainant Smt. Barfa Devi and the deceased Lavkush. From then, Jai Prakash was absconding and murder case was pending against him.

4. In the intervening night of 8/9.8.1989 P.W. 1 Smt. Barfa Devi and Lavkush were sleeping on the roof of their house. A lighted lantern was kept there. The deceased Lavkush was sleeping on a cot which was about of 1 ft. high while P.W. 1 Barfa Devi was sleeping on the floor of the roof. Both the sons of Barfa Devi were at Jamshedpur and no other family member was there. The houses of Akshaibar and P.W. 2 Parmatma and P.W. 3, Tara were in the west and north of the house of Barfa Devi. Western house was "kachcha" while northern house was pucca. On the terrace of the northern house, P.W. 2, Parmatma and P.W. 3, Tara were sleeping. In the east of the house of complainant Barfa Devi, there was house of Rajendra but the roof of this house was of khaprail. The distance between the roof of northern house of P.W. 2, Parmatma and P.W. 3, Tara was about 3 ft. The distance between the roof of Rajendra and Barfa Devi was a bit less.

5. At about 3 a.m. Barfa Devi, feeling that some persons had arrived on the roof, woke up and raised an alarm. She saw the accused Jai Prakash and his brother Prem Kumar standing there, having country made pistols in their hands. On the cry of Barfa Devi they shouted that the old lady should be killed. Thereafter the Appellants Jai Prakash and his brother Prem fired four or five shots from their country made pistols upon Lavkush. Thereafter, Jai Prakash went upto 4-5 paces, returned again and fired a shot from his country made pistol upon Lavkush. Lavkush died then and there. The Appellant Jai Prakash and his brother Prem went through the roof and the staircase of the house of Akshaibar. Before leaving the place of occurrence the Appellants and his brother threatened Barfa Devi that they would not spare her sons alive. P.W. 4, Rishidev was sleeping on the terrace of his house. Accused Appellant and Prem also threatened him that in case he would come forward for the help, he would also meet the same fate.

6. Smt. Barfa Devi called P.W. 4, Rishidev from his house after half-an-hour and got prepared report Ext. Ka-1 at her house. Leaving the dead body at the place of occurrence, on the roof, Barfa Devi along with chowkidar Hussaini, went to the police station and lodged the report on 9.8.1989 at 6.45 a.m. The distance of the police station from the place of occurrence was about 6 km. P.W. 5, Constable K. P. Misra recorded the chick report, Ext. Ka-2, and made the entry in the G.D. on 9.8.1989 at 6.45 a.m. copies of which is Ext. Ka-3. P.W. 6, Nagesh Pratap Singh, the Investigating Officer, took up the investigation and reached the place of occurrence

at 7.50 a.m. and he prepared the inquest report and necessary papers for sending the dead-body for post-mortem examination. He prepared the site-plan. He took blood stained clothes and also 41 pellets which were found on the cot and prepared the memos. One lantern, which was lit in the night of the occurrence, was also inspected by the Investigating Officer and he found it in working order. He prepared the memo and gave lantern in the supurdgi of Barfa Devi. The Investigating Officer recorded the statement of Barfa Devi and Rishidev. Tara and Parmatma were interrogated on 10.8.1989. The accused-Appellant Jai Prakash was absconding. His moveable property was under attachment. The Investigating Officer obtained the orders for the sale of the property of Jai Prakash, the Appellant. On 22.8.1987. Jai Prakash accused-Appellant surrendered in the Court and he was interrogated by the Investigating Officer on 8.9.1989.

7. Post-mortem examination on the dead body of Lavkush (deceased) was conducted by Dr. K. N. Pandey on 10.8.1989 at 4 p.m. The genuineness and correctness of the post-mortem report was admitted by the Appellant before the trial court.

8. According to the post-mortem report, the doctor found the following ante-mortem injuries on the dead body of the deceased:

(1) Gun-shot wound (wound of entry) 3 cm. x 3 cm. x bone deep on the right side face, 3 cm. in front and above right ear. Margins inverted. Blackening, tattooing, charring present around the wound. It was directed upwards.

(2) Gun-shot wound (wound of exit) 4 cm. x 4 cm. x brain cavity deep on right side head 10 cm. above right ear. No blackening, tattooing and charring present, margins everted.

(3) Gun-shot wound (wound of entry) 3 cm. x 3 cm. x bone deep on right side cheek 4 cm. left to outer angle of right side. Blackening, tattooing and charring present. Margins inverted. It was directed downwards.

(4) Gun-shot wound (wound of exit) 4 cm. x 4 cm. x bone deep on left side neck 3 cm. below left ear. Margins everted. No blackening, no charring and tattooing present. This wound was communicating with Injury No. 3.

(5) Gun-shot wound (wound of entry) 3 cm. x 3 cm. x chest cavity deep on the right side front of chest 8 cm. above right nipple. Margins inverted. Blackening, tattooing, charring present. Directed backwards and to the left.

(6) Gun-shot wound (wound of entry) 4 cm. x 4 cm. x abdominal cavity deep on the right side abdomen. 10 cm. below umbilicus. Margins inverted. Blackening present. Directed backward.

(7) Gun-shot wound (wound of entry) 3 cm. x 3 cm. x bone deep on front of right knee joint. Margins inverted blackening present. Directed backwards, under it right

patella broken.

9. Two wadding pieces were recovered from the left side of the neck, 20 small pellets were recovered from the right side of the face and buccal cavity. Twenty small pellets were recovered from the brain cavity. Sixty small pellets and two wadding pieces were recovered from the chest cavity. Thirty-six small pellets and 3 wadding pieces were recovered from abdominal cavity and 50 small pellets and two wadding pieces were recovered from the right patella and knee-joint. In all 9 wadding pieces and 186 small pellets were recovered.

10. On internal examination, it was found that all the bones under Injury Nos. 1, 3 and 4 were broken into pieces, all the skull bones and the base of skull was broken into pieces under Injury Nos. 1 and 2. Membranes were badly lacerated. Brain was badly lacerated. Both the lungs were lacerated. Chest cavity contained 2 pounds of blood. Heart was lacerated. Both the chambers of the heart were empty. Abdominal cavity contained one pound of blood. Stomach was empty. Large and small intestines were punctured at places. Bladder was also lacerated. The cause of death, according to the post-mortem report, was shock and haemorrhage as a result of ante-mortem gun-shot injuries.

11. In order to prove its case, the prosecution examined in all 6 witnesses. P.W. 1, Barfa Devi, is the eye-witnesses. P.W. 2, Parmatma Dubey, P.W. 3, Tara Prasad Dubey, P.W. 4, Rishdev, are also eye-witnesses but they have turned hostile. P.W. 5, Constable K. P. Misra, who prepared the chick report and registered the case, P.W. 6, Nagesh Pratap Singh, the Investigating Officer, submitted the charge-sheet after investigating the case against Jai Prakash. The other accused Prem remained absconding.

12. The accused-Appellant, Jai Prakash, in his statement u/s 313, Cr. P.C. stated that he had no enmity with Lavkush deceased or his family members. He admitted that the murder case of Shatrughan was pending against him. He further stated that he did not abscond but he was out of village. He did not adduce any evidence in defence.

13. The trial court after scrutinising and analysing the evidence of the prosecution found the charge proved against the Appellant Jai Prakash and convicted and sentenced him, as mentioned above.

14. We have heard Sri V. C. Tewari, learned senior advocate, for the Appellant, Sri Amarjit Singh, learned A.G.A. for the State and Sri Shami-ul-Hasnain for the complainant, and have perused the entire evidence on record.

15. It was contended on behalf of the Appellant that there is sole witness. P.W. 1, Smt. Barfa Devi. The other eye-witnesses, viz., P.W. 2, Parmatma Dubey, P.W. 3, Tara and P.W. 4, Rishidev did not support the case of the prosecution so far as the involvement of the Appellant is concerned. The presence of light is doubtful. The

F.I.R. was prepared after the visit of the place of occurrence by the Investigating Officer as in the "panchayatnama" 7 injuries were recorded. Therefore, in the F.I.R. it was got written that the first accused fired four and five shots and later on the Appellant fired one more shot. No blood was found on the floor. It is the case of single testimony of a highly interested witness. The motive alleged is very remote. The accused and the deceased belonged to the same family. After the decision of case relating to property, which ended about 11 years before the date of occurrence, not a single incident took place between the parties prior to the murder of Shatrughan, son of Lavkush deceased alleged to have been committed by the Appellant Jai Prakash. Evidence of P.W. 4, Rishidev cannot be read in support of the case of prosecution being doubtful. The single testimony cannot form the basis of conviction unless it is unimpeachable and fully reliable having some corroboration from other evidence.

16. Learned A.G.A. and the counsel for the complainant supported the judgment of the trial court. They argued that Lavkush was the complainant regarding the murder of his son Shatrughan and P.W. 4, Rishidev was the scribe of that F.I.R. There is no reason assigned for the false implication of the Appellant. There is no suggestion to P.W. 1 about the enmity of Lavkush with some other person. It was further argued that the co-accused Prem is absconding and his brother-in-law is in Nepal and most probably he is in Nepal.

17. In this case, the date, time, place and cause of death have not been disputed or challenged before us. P.W. 1, Barfa Devi stated that on the fateful night, she and her husband were sleeping on their roof. In winter, they used to sleep in the house but in other seasons, they used to sleep on the roof. There was one lantern which was used in the house while working there and in the night it was taken to the roof where they used to sleep. The deceased Lavkush was sleeping on a cot and she was sleeping on the floor of the roof.

18. It was contended by the learned Counsel for the Appellants that the F.I.R. was suspicious and it does not appear to have been lodged on the morning of 9.8.1989 at 6.45 a.m. as it is mentioned in it that today on the night of 8.8.1989 the informant after taking meals was sleeping on her roof and occurrence took place in the said night at about 3 a.m. This version is correct. It is true that the F.I.R. was lodged on 9.8.1989 and the occurrence took place at about 3 a.m. in the intervening night of 8/9.8.1989. An illiterate person like the informant will naturally say that she slept in the night of 8.8.1989. Therefore, writing of 8.8.1989 pre-fixed by word today will not make any difference. It is not the case of the defence that the occurrence did not take place between the intervening night of 8/9.8.1989 at about 3 a.m. P.W. 2, Parmatma Dubey and P.W. 3, Tara Prasad have been declared hostile, but they have supported the prosecution case to the extent that between the night of 8/9.8.1989 at about 2 or 3 a.m. they heard sound of fire. They also supported the factum of murder of Lavkush in the said night. P.W. 4, Rishidev supported the case of the

prosecution, so far the scribing of the F.I.R. and also hearing the shots of the fire and hearing the threats extended by the assailants. He stated that between the night of 8/9.8.1989 at about 3 a.m. when he was sleeping on his roof, which was about 50 steps away from the roof of the deceased, he heard the sound of three fires and also the threats given by the assailants. He also heard that Smt. Barfa Devi was weeping. P.W. 6, Nagesh Pratap Singh, the Investigating Officer, visited the spot on 9.8.1989 at 7.50 a.m. and found the dead body on the cot at the roof of the house of Barfa Devi. He found the clothes on the cot soaked with blood. He found 41 pellets on the clothes lying on the cot. The absence of blood on the roof is not material as the blood in all probabilities would have been soaked in clothes and bedding of the deceased. In case murder of Lavkush would have taken place at some other place, the dead body would not have been placed on the roof on the cot. Normally, a dead body, if shifted or brought from some other place, is kept at the door of the house. The injuries were caused by the fire-arms. P.W. 1, Barfa Devi, has stated that the Appellant and the co-accused Prem fired shots from country-made pistol from a distance of 1 ft. The doctor found wadding pieces inside the body and blackening, tattooing and charring present around the 5 wounds of entries. Thus, from the unimpeachable evidence of these witnesses, the prosecution has established beyond all reasonable doubts that the murder of Lavkush took place in the intervening night of 8/9.8.1989 at about 3 a.m. by gun-shots on the roof of P.W. 1, Barfa Devi in village Malpar.

19. P.W. 1, Barfa Devi stated that after half an hour, she called P.W. 4, Rishidev from his house at about 5 a.m. and on her dictation Rishidev prepared the F.I.R. Leaving Hari Lal near the dead body, she along with chowkidar Hussaini went to the police station and lodged the report. P.W. 5, Constable K. P. Misra, supported the version P.W. 1, Barfa Devi. He stated that at 6.45 a.m. on 9.8.1989 on the basis of the written report handed over by Barfa Devi he prepared the chick report and made entry in the G.D. P.W. 6, Nagesh Pratap Singh was present at the police station when the F.I.R. was recorded. He reached the place of occurrence at 7.50 a.m., i.e., within about an hour of the recording of the F.I.R. P.W. 4, Rishidev, who had partly supported the case of the prosecution, in cross-examination, stated that he had not prepared report (Ext. Ka-1) at the police station but had written the same in the village before inquest of the dead body.

20. It was pointed out that the last four lines of the F.I.R. show that in fact the F.I.R. was prepared at the police station after the preparation of "panchayatnama". The lines are,

It was argued that from the statement of P.W. 4 coupled with the recital in the F.I.R. goes to show that the F.I.R. was written at the police station and it was not recorded at the house of the complainant, as has been stated.

21. We have given our careful consideration to this argument. The trial court has also dealt with this aspect into detail by citing various judgments. On close scrutiny

of the statement of P.W. 4 and the recital of the F.I.R. only one thing can be deduced that it is the way of writing of the report how a particular writer would write it. It is true that the last three lines somewhat give impression that the F.I.R. was written at the police station but the statement of P.W. 1 Barfa Devi and P.W. 4, Rishidev, show that the report was written at the house of complainant and it was in existence before the "panchayatnama" was conducted. Smt. Barfa Devi is an illiterate lady. She was cross-examined at length. From her cross-examination, nothing could be brought on record which would impeach her testimony on any count.

22. It was further contended on behalf of the Appellant that there was no light and it was not possible for P.W. 1 Barfa Devi to recognise the assailants. P.W. 1 Barfa Devi stated that a lighted lantern was there, while P.W. 4, Rishidev stated that there was darkness and he could not see the assailants. He stated that the light of lamp ("diya") was there, meaning thereby there was some light but the light was not sufficient to recognise the assailants from a distance of about 50 steps. P.W. 6, Nagesh Pratap Singh, the Investigating Officer, inspected the lantern and he found it in working condition. P.W. 1 Barfa Devi stated that she did not lower the wig of the lantern. The blackness was caused on the glass of the lantern. If we analyse the statement of these witnesses, keeping in mind that P.W. 1 Barfa Devi was sleeping near the cot of the deceased on the roof and the assailants were known persons, the light emitted by lantern, would be sufficient for a person who was in the vicinity of the incident on the same roof, hardly 1 or 2 ft. away from the cot to recognise the assailants. This light might not be sufficient to a person who was about 50 steps away lying on the terrace of his house. Further, it is the case of the prosecution that the assailants extended threats. In that process, a person can be recognised by his voice. It was argued on behalf of the Appellant that firstly, it is to be proved that the assailants were known persons, only then such light and recognition by voice will be taken into account. We have considered this. We have to take the statement of P.W. 1 Barfa Devi and to test it on the basis of cross-examination and in that process we find that the statement of P.W. 1 is truthful and there was sufficient light for P.W. 1 to recognise the assailants without any mistake. Further, when the assailants extended threats, she was in a position to further recognise them by their voice. No suggestion or reason has been assigned or given by the Appellant as to why he was falsely implicated. No enmity of deceased Lavkush with other persons was suggested or proved.

23. It was argued that motive is very remote. In the F.I.R. it was not mentioned that the Appellants were unhappy inside their hearts but outwardly they did not exhibit any enmity. During the long gap of 11 years, no incident had taken place between the parties, except the murder of Shatrughan which took place six months prior to this murder allegedly committed by the Appellant Jai Prakash and that there was no ground for the Appellant to commit the murder of Lavkush because the property of Chandrika Prasad was given to his sons and by murdering Lavkush the Appellant would not get the property.

24. We have carefully considered this submission advanced on behalf of the Appellant. How the minds of different persons work in a given situation, cannot be anticipated. Reaction of a person to a particular situation will differ from person to person. What was working in the mind of the Appellant to some extent could be inferred or assessed by his actions. P.W. 1 Barfa Devi, has rightly stated in her cross-examination that if there was no enmity, the Appellant would not have murdered Shatrughan. Therefore, P.W. 1 Barfa Devi has explained everything in this regard. The motive may not be immediate. There are cases that even after a lapse of 30 years, after a change of generation, due to very remote motive occurrence did take place. Therefore, one cannot infer how the Appellant took the defeat in the litigation regarding the property.

25. It is proved from the evidence on record that Shatrughan was murdered in February, 1989 and the Appellant was named as an accused in that case. His property was attached in February, 1989. From then he was absconding. There is also evidence that the co-accused Prem is absconding. P.W. 2 and P.W. 3 have admitted that brother-in-law of Prem and Jai Prakash is in Nepal. It is also stated by witness that after the occurrence of this case, Prem was not seen in the village. This statement has never been challenged by the Appellants. Therefore, the possibility that the murder of Lavkush was committed to lay pressure on his family not to give evidence in the murder case of Shatrughan cannot be easily ruled out.

26. The reason for not supporting the case of prosecution by Parmatma and Tara Prasad is also evident. It has come in the cross-examination of these witnesses. P.W. 2, Parmatma is the real uncle of P.W. 3, Tara. P.W. 3 admitted that about 4 years ago Shatrughan caused injuries to him. He lodged the report against Shatrughan u/s 325, I.P.C. the statements of P. Ws. 2 and 3, if read as a whole, would go to show that these witnesses knowingly did not support the case of the prosecution. Their conduct was also unnatural. Non-supporting of case of prosecution as far as involvement of Appellant by these witnesses is concerned will not affect the case of the prosecution.

27. P.W. 1 Barfa Devi has given spot position of the adjoining houses and position of the staircase of the house of Akshaibar. The spot position given by P.W. 1 has not been challenged.

28. P.W. 1 Barfa Devi stated that other persons also had seen the occurrence. It is in the general parlance that she had said so but she had named none else. It will not detract the value of her testimony. It is well-settled principle that corroboration can be taken even from the evidence of hostile witnesses. Hostile witness does not mean untruthful witness. For many reasons, a witness chooses not to disclose full truth. P.W. 1, Barfa Devi is a related witness, being the wife of deceased Lavkush. But at the same time, she is also closely related to Appellant. She is the natural witness. Her presence cannot be doubted at the time of occurrence. Rule of caution requires that some corroboration should be there. The statement of P.W. 1 Barfa



Devi finds corroboration from the F.I.R., which has strong corroborative value. Her statement finds corroboration also from partly hostile witness, P.W. 4 Rishidev. Further, it finds corroboration from the hostile witness P.W. 2, Parmatma Dubey and P.W. 3, Tara Prasad. Further, her statement finds full corroboration from the medical evidence, i.e., the post-mortem report. If no injury was caused to P.W. 1, it would not create any doubt in her presence at the time of the occurrence. It was argued on behalf of the Appellant that finding that 7 injuries were recorded in the "panchayatnama", then accordingly in the F.I.R. four or five shots and then one shot was got written. P.W. 2 had stated that he heard three shots of the fire. P.W. 1 had stated that four or five shots were first fired and then Jai Prakash fired one more shot. These shots were fired from close range. Wadding pieces and 186 small pellets were recovered from the body of the deceased and 41 pellets were recovered by the Investigating Officer from the cot. All these medical facts support and corroborate the statement of P.W. 1.

29. P.W. 4 Rishidev has corroborated and supported the statement of P.W. 1 Barfa Devi. P.W. 1 Barfa Devi stated that the Appellant extended threat to her and also to Rishidev. P.W. 4 Rishidev supported that he heard the threat extended to Barfa Devi by the assailants and also he heard the threat extended by the assailants to him but he could not recognise the assailants by their voices or by faces as there was darkness. Only light of a lamp ("diya") was on the roof of P.W. 1 Barfa Devi. Thus, the statement of P.W. 1 finds full corroboration from the evidence of P.W. 4, Rishidev.

30. After analysing and on close scrutiny of the statement of P.W. 1, Barfa Devi, we find her to be a truthful and wholly reliable witness. Therefore, the sole testimony of Smt. Barfa Devi supported by F.I.R., medical evidence and other circumstances is sufficient to base conviction of the Appellant.

31. In view of the aforesaid, we do not find any merit in this appeal which is hereby dismissed. The Appellant is on bail. He shall surrender before the C.J.M., Siddharthanagar, to serve out the sentence. Learned C.J.M. concerned shall issue the warrant of arrest against the Appellant to send him to jail to serve out the sentence.

32. Office is directed to send a copy of this order to the C.J.M. concerned for compliance and submitting a compliance report to this Court within one month of the receipt of the copy of this judgment and order.