

(2016) 10 AHC CK 0020

ALLAHABAD HIGH COURT

Case No: Criminal Appeal No. 2487 of 1983

Mahadeo

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: Oct. 17, 2016

Acts Referred:

- Penal Code, 1860 (IPC) - Section 147, Section 148, Section 149, Section 302, Section 323

Citation: (2016) 10 ADJ 11

Hon'ble Judges: Arvind Kumar Tripathi and Mukhtar Ahmad, JJ.

Bench: Division Bench

Advocate: A.G.A, for the Respondent; R.N. Rai, S.K. Srivastava and Shiv Naresh Singh, Advocates, for the Appellant

Final Decision: Allowed

Judgement

Mukhtar Ahmad J. - This appeal has been preferred against the judgment of conviction and sentence dated 30-9-1983, passed by Additional Sessions Judge, Mirzapur in Sessions Trial No. 385 of 1982 arising out of Case Crime No. 83/1981 under Section 147, 148, 149, 323/302 I.P.C. This appeal has been filed on behalf of 12 appellants out of which 7 appellants namely Mahadeo, Bhagwati, Janki, Kali Dass, Buddhu, Shobhai @ Shobhit and Bandhu have died and appeal in their respect have already been abated. Now this appeal is being pressed on behalf of five surviving appellants namely appellant No.2- Ram Dhani, appellant No 3- Ram Pati, appellant No.5- Prem, appellant No.10- Ram Bali and appellant No. 11- Dulary. The sentences awarded to the surviving appellants are as under:

Ram Pati and Ram Dhani-each of them has been awarded imprisonment for life for the offence punishable u/s 302/149, Rigorous Imprisonment for six months u/s 323/149, and one year Rigorous Imprisonment u/s 148 IPC.

Appellant Prem, Ram Bali and Dularey-each of them has been punished with imprisonment for life for the offence punishable u/s 302/149, Rigorous Imprisonment for six months u/s 323/149, and six months Rigorous Imprisonment u/s 147 I.P.C. All sentences were ordered to run concurrently.

2. Case of the prosecution is that on 9-4-1981 informant Ramji Dubey PW- 3 gave a written Tehrir to the police Station Chopan District Mirzapur that he is resident of village Bargawan Police Station Chopan District Mirzapur and looks after the farming of Sant Kumar Tiwari in village Karji. That in the morning Ram Pati Baiga of Village Bargawan was collecting Mahua of Sant Kumar Tiwari. He and Jag Deo Khatik s/o Buddhoo restrained him from doing so and ran him away but Ram Pati Baiga went therefrom leaving serious threats. That in the evening at about 5 p.m. Ram Pati Baiga along with Bhagwati Baiga s/o Ganpati Baiga, Prem Baiga s/o Bhagwati Baiga. Pusay Baiga s/o Ganpati Baiga, Buddhu Baiga s/o Mahadeo Baiga, Ram Bali Baiga s/o Mahadeo Baiga Janki Baiga, Sobhai Baiga, Dularey Baiga s/o Sobhai Baiga, Kali Dass Baiga, Ram Dhani Baiga and Bandhu Baiga s/o Kali Das Baiga all of village Bargawan forming a goal having Tir Kaman, lathi, Balua in their hands, came in Khalihan of mahua belonging to Sant Kumar Tiwari, near to his residence in village Karji. At that time informant and Jagerdeo Khatik were collecting mahua in the khalihan. Ram Pati Bega exhorted to kill us, on this all the accused persons started to assault informant and Jager Deo Khatik with arrows and lathies. On their hue and cry Shiv Tahal Pw-2, Jai shree and Kallu, who were present on the door of Sant Kumar Tiwari rushed there then accused persons fled away therefrom. That Jagerdeo Khatik succumbed to the injuries sustained. Informant was also assaulted and he also received injuries in the incident. On that tahrir first information report was registered against aforesaid accused persons.

3. Investigation was taken over by Yogendra Singh, station officer of police station Chopan Mirzapur. He recorded the statement of first informant Ram Ji Dubey and sent him for medical examination to primary health centre and reached on the spot, conducted inquest of dead body of the deceased, thereafter sent the dead body in sealed position for postmortem with necessary papers through constables Vijay Tiwari Pw-8 and Hardeo singh. He also recorded the statements of the witnesses and visited the spot, collected simple and blood stained soil and also prepared site plan.

4. Upon completion of the investigation 13 accused persons named in the first information report were charge sheeted. Before committal one accused Pussey died, so case in his respect was abated and for remaining accused persons the matter was committed to the court of session for trial, where charges were framed against accused persons. They did not plead guilty and claimed to be tried.

5. In order to substantiate the charges as many as 11 witness were examined on behalf of the prosecution, out ow which 4 witnesses namely PW. 1, 2 and 3 are the witnesses of fact, they have deposed eye witness account too. PW 4 K.K. Dhar Dubey

is also a witness of fact who happens to be the scribe of the tahrir. Pw-5 Dr. V.Singh Medical Officer P.H.C. Robert Gunj had conducted postmortem on the dead body of deceased Jager Deo on 10-4-1981 at 4.30 p.m. He found the deceased to be aged about 30 years and his death having taken place about a day earlier and rigor mortis was present in both the legs. He found the following anti mortem injuries on his body:

1. Incised wound 4 cm x 1.5 cm x bone deep middle of forehead. 4 cm. above medial end of left eyebrow. Vertical in direction and cut margins.
2. Lacerated wound 4.5 cm x 2 cm x bone deep on left side of head 8 cm above ear with fracture of partial bone.
3. Lacerated wound 4 cm x 2 cm x bone deep on left side of head 10 cm. above ear and 4 cm behind injury no. 2. with fracture of partial bone.
4. Lacerated wound 6 cm x 1.5 cm x bone deep in mid line of head 10 cm above injury no. 1.
5. lacerated wound 2 cm x 2 cm x bone deep on the back of head 8 cm above 7th cervical vertebra.
6. Lacerated wound 2.5 cm x 1.5 cm x bone deep on back of head left side 6 cm lateral to injury no. 5.
7. Contusion 10 cm x 2.5 cm on right side of chest 10 cm above nipple oblique in direction.
8. Contusion 7 cm. X 4 cm on left shoulder joint.
9. Abrasion 8 cm x 3 cm on upper and outer side of left thigh 12 cm below hip joint.
10. Abrasion 2.5 cm. X 1.5 cm in the front of left leg 5 cm below knee.
11. Contusion 15 cm x 8 cm on left side of back 10 cm below shoulder joint.

On internal examination of the body left partial bone was found fractured at two places, membranes were found full of blood, brain was congested and full up with blood up to skull cavity. Left 5th to 8th ribs were also found ruptured. Left lung was punctured in an area of 4 cm.x 3 cm.Semi digested food was present in the stomach and intestines were full with focal matter and spleen was found enlarged and ruptured in an area of 12 cm. X 5 cm, bladder was empty. In his opinion cause of death was shock and hemorrhage due to anti mortem injuries. He was of the opinion that death could have occurred at 5 pm. On 9-4-1981 and injury no 1 was likely to be caused by Balua. Pw-6 Yogendra Singh is the Investigating officer. Pw-7 Head Constable Udai Raj had registered the First Information Report and made entry in the concerning G.D. Pw-8 Constable Vijai Tiwari had sent the dead body of the deceased in sealed position for post mortem along with necessary papers. Pw.9 Dr. S.K.Verma Medical Officer P.H.C. Chopan examined first informant Ramji Dubey

on 9-4-1981 at 10.30 p.m. and found the following injuries on his person:

1- Lacerated wound 4 cm. X 0.5 cm x 0.5 cm on left side on his scalp 11 cm above from left ear and the wound was bleeding.

2- Contusion 6 cm x 2 cm red in colour on left shoulder horizontally.

3- Contusion 6 cm x 2 cm on the back of the left forearm 5 cm below from left elbow joint horizontally.

4- Contusion 7 cm x 7 cm on left side of back at the level of lower angle of scapula, horizontally and red in colour. The Clothes of the injured were blood stained.

Injury no.1 was kept under observation and x-ray of skull was advised and rest of the injuries were found simple, fresh and caused by some blunt object like lathi. In his opinion the injuries could have been caused at 5 p.m. On 9-4-1981. Pw-10 Constable Ram Murat Singh is the witness through whom special report of the case was sent to the higher authorities. Pw-11 constable Mohammad Ibrahim is the witness who had taken the sealed articles from Sadar Malkhan and deposited the same in the office of Chief Medical Officer, where from it was sent for chemical analysing.

6. After concluding prosecution evidence statements of accused persons under section 313 Cr.P.C were recorded. Accused persons denied almost all the questions and asserted their false implication. However it was asserted that deceased had attempted to commit rape on Bechani w/o accused Ram Pati and villagers had beaten him in the night. It was also stated that Medical examination of Ram Ji was got subsequently.

7. Learned trial Judge after analysing the prosecution evidence found the charges proved against all the accused persons and awarded the sentence to them as stated above, which has been assailed in this appeal.

8. We have heard Mr. Shiv Naresh Singh Advocate appearing on behalf of appellants and Mr. Chandra Jeet Yadav learned Government Advocate.

9. It is submitted by learned counsel for the appellants that the prosecution has failed to prove the offence of murder beyond reasonable doubt. The so-called eye witnesses, i.e. Pw.1 Kalloo Singh, Pw. 2 Shiv Tahal. Pw. 3 Ramji Dubey informant and P.W. 4 K.K. Dhar Dubey were in fact not the eye witnesses at all. Their statements recorded under section 161 Cr.P.C have severe discrepancies. Moreover, there is a gross discrepancy in narration of weapons used by these appellants as per the deposition of the prosecution witnesses and as stated in the F.I.R. Thus, aforesaid witnesses who are adduced as eye witnesses are not trustworthy at all. This aspect of the matter has not been properly appreciated by the learned trial court and hence, judgment and order of conviction and sentence deserves to be quashed and set aside.

10. Per contra learned A.G.A. appearing on behalf of the State, has submitted that case of the prosecution is based upon deposition of the eyewitnesses. They have clearly narrated the role played by these appellants and looking to the medical evidence given by Pw.5 Dr. V. Singh, who conducted post mortem examination of the deceased, there is enough corroboration of the deposition of the prosecution witnesses. It is also submitted by him that there may be discrepancies between the ocular evidence and medical evidence, because medical evidence is an opinion only, whereas case of the prosecution is based upon more than one eye witness, i.e. Pw.1, 2, 3 and 4 and looking to their deposition, it appears that prosecution has proved the fact that offence of murder of the deceased has been committed by these appellants beyond reasonable doubt. This aspect of the matter has been properly appreciated by the learned trial court and therefore, this appeal deserves dismissal.

11. Having heard learned counsel for both sides and looking to the facts and circumstances of the case, it appears that as per prosecution the incident took place on 19-4-1981 at about 5 p.m. and P.W.3 informed the police at about 9.30 p.m. on the same day that the appellants and other co accused assaulted first informant Ram Ji Dubey and Jager Deo when they were collecting mahua in khalian of Sant Kumar Tiwari. The assault was made by kamans and lathies. Admittedly the weapons were not assigned to the accused persons in first information report. First time Pw.3 disclosed in the court when he was examined ascertaining as which of the accused was having which weapon. At this juncture it is also relevant to note that FIR is silent on the point of use of balua. It appears that when in postmortem report incised wound was found on sculp of the deceased then with a view to justify this injury Pw-3 Ramji Dubey first time in the court depicted that appellant-accused Ram Pati baiga was having walua and he inflicted injuries to deceased by balua, which in our view is nothing but an improvement and put shadow of doubt on the prosecution version itself. Pw-3 in his oral evidence has deposed that accused Rama Pati had Baiga had exhorted to kill him and Jager Deo then all the accused persons started to assault them by the weapons which they were having and both of us had received injuries. This witness further says that Jagar Deo Succumbed to the injuries sustained. It is further stated by him that in the written tahrir he could not gave the description of weapons connecting with accused due to agony. Thus giving description of weapons first time in the court puts shadow of doubt. It is not disputed that neither deceased nor first informant received any injury of arrow though in first information report both of them were also targeted with arrows too. The description given by Pw-3 in this regard is "eqfYteku deku ij rhj p<+k dj bl rjg ls pykrs Fks fd rkfd rhj eqfYteku esa ls fdlh dks u yxs vkSj dsoy txj nso dks yxs ij txj nso dks dksbZ rhj ugha yxhA" He didn't explain as to how he did not receive any injury of arrow. As per Pw.3 some of the accused persons were causing injuries by lathies but non of them received any injury of arrow. This explanation is very surprising and in our opinion is unbelievable. Considering the discrepancies in oral testimony of Pw-3, in our view his testimony lost confidence and is not trustworthy as such is not

reliable.

12. As for as evidence of Pw-1 and Pw-2 is concerned, as per FIR version these witness after hearing hue and cry of Ram Ji Dubey had rushed to the spot from the door of the house of Sant Kumar Tiwari, where they were sitting. Pw-1 Kallu Singh is resident of village Jugail and was looking after the farming of Sant Kumar Tiwari for about 16 years. He deposed that he, Jai Shree and Shiv Tahal rushed towards spot after hearing noise of Ram Ji Dubey, where Jagar Deo was found lying on the earth and Ram Ji Dubey was present there but assailants had gone away and they were about 3-4 Bigha towards North. Pw-2 in his oral evidence has stated that hearing hue and cry of Ram Ji Dubey he, Kallu (Pw-1) and Jai Shree had reached on the spot together, which was at the distance of about 40 spans. He further says that when accused having lathies were causing injuries, at that time some of the accused were throwing arrows from the distance of about 10 yards. Pw-3 in his testimony says that "ekjihV ,d nks feuV rd gqbZ Fkh" which make it suspicious that Pw-1 and Pw-2, who reached on the spot after hearing hue and cry, watched the entire incident from beginning to end and we do not find the oral testimony of Pw-1 and Pw-2 trustworthy and reliable. Overall cross examination of these prosecution witnesses make it clear that they were not present when the offence had taken place. It would not be out of place to mention here that as per prosecution case an incident had also taken place in the morning when first informant Ram Ji and deceased Jagar Deo had ousted accused Rampati Baiga while he was collecting mahua of Sant Kumar Tiwari and he went therefrom leaving serious threats and it was the reaction of that incident when Ram Pati Baiga along with other co-accused persons came in the evening and incident of murder took place. According to the prosecution witnesses this fact was disclosed to Investigating officer but Investigating officer denied from such disclosure and it is not recorded in their statements under section 161 Cr.P.C. Further we find that the appellants had no strong motive to commit the murder of Jagar Deo. Moreover it does not stand to reason that merely because of objection of deceased and first informant to restrain Rampati from collecting mahua from the tree of Sant Ram Tiwari, the accused persons would have committed murder. The accused persons might harbouring grudge against deceased but they had to strong motive to commit his murder. Thus motive of incident is very weak, which too has not been established.

13. Therefore, In view of the evidences on record and discussion made above, we are of the view that the prosecution has failed to prove the charges of murder beyond reasonable doubt against all the appellants. Accordingly, this appeal is allowed and the judgment and order of conviction and sentence dated 30-9-1983, passed by the learned Additional Sessions Judge, Mirzapur in Sessions Trial No. 385 of 1982 (State of U.P. v. Mahadeo and Others) is hereby, set aside, consequently appellants are acquitted. They are on bail, therefore, their bail bonds are cancelled and sureties are discharged from their liability subject to furnish fresh bail bonds and sureties before the trial Court to its satisfaction in compliance of Section 437A

Cr.P.C.

14. Let copy of this judgment be sent to the Court concerned for ensuring compliance under intimation to this court.