

Onkar Mishra and Others Vs. State of U.P

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Court : Allahabad

Decided On : Oct-17-2012

Judge : A.K. Sharma & Rakesh Tiwari

Appeal No. : Criminal Appeal No. 1776 of 2003

Appellant : Onkar Mishra and Others

Respondent : State of U.P

Judgement :

1. IN both these appeals, the appellants have challenged the judgment and order dated 5.4.2003 passed by Sri K.K. Pandey, the then Additional Sessions Judge/Fast Track Court no. 5, Gorakhpur in S.T. No. 506 of 2001, whereby all the three accused-appellants aforesaid, have been found guilty for the offence punishable under section 302/34 IPC and each appellant has been sentenced to imprisonment for life and fine of Rs. 10,000/- each with default stipulation.

2. THE prosecution story, in brief, is that Smt. Renu Singh P.W.1 resident of village Barahi, Police Station Jhagha, District Gorakhpur, submitted a written report scribed by Vinay Kumar Singh at Police outpost Barahi on 29.5.2001 at about 5.45 P.M. wherein she stated that Pradhan Sadhu Sharan Yadav is inimical to them on account of old land dispute etc. and they used to threaten her husband for life. On 29.5.2001 at about 5.15 P.M. when her husband Kapil Dev Singh along with son Chandra Prakash, co-villager Ajay Singh after purchasing vegetables

from the market, reached in front of the house of Balbhadra Kurmi, they were intercepted by Sadhu Sharan Yadav, Onkar Mishra and Sanjay Mishra, both sons of Jai Govind Mishra, who were waiting from before and on the exhortation of Sadhu Sharan Yadav, he and Sanjay Mishra caught hold her husband and Onkar Mishra with country made pistol fired shot from close range on the face of her husband who immediately died on the spot. On the hue and cry raised by her son and Ajay Singh, several people arrived there and saw the incident. The accused persons made their escape good towards southern window of her house and she had also seen them running through the window. Her son Chandra Prakash crying came back home and narrated the entire incident to her whereupon she dictated report to Vinay Kumar Singh son of Dina Nath Singh, resident of village Chithari and submitted at Police outpost Barahi. Report of the complainant was taken down by outpost Barahi and case was registered at crime no. nil which was later on noted as crime no. 210 of 2001, under section 302,506 IPC, at Police Station Jhagaha, District Gorakhpur.

Investigation of the case was taken up by S.O. Raghubir Singh, who getting information of the crime through R.T. Set, reached at the spot and interrogated the complainant. SI R.C. Yadav conducted inquest proceedings of the deceased on his instructions at 7.30 P.M. and he sent the dead body for postmortem examination through constables Ram Dularey and Munnu Prasad in sealed condition alongwith usual papers.

Dr . Surendra Deo conducted autopsy on the cadaver of the deceased on 30.5.2001 at 5 P.M. He found that 32 years' old deceased was average body built, rigor mortis was present in all the limbs, eyes and mouth were closed. The doctor found the following ante mortem injury on the person of the deceased :

"Gunshot entry 5 cm. x 3cm.on left side face just lateral to nose on cutting upper jaw and skull base was fractured. 13 small metallic pellets and two plastic wading in pieces were found in the wound. There is no wound of exit present. Blackening and charring present."

In the opinion of doctor, the deceased suffered death due to head injury about a day before.

3. ERE that Investigating Officer visited the place of occurrence, prepared site plan and also collected plain and blood stained earth from the spot and sealed them in different containers through memo Ex. Ka-11. On 30.5.2001 he interrogated witnesses Chandra Prakash and Ajay Singh. The earth collected from the spot and apparels of the deceased were sent for examination to Forensic Science Laboratory, Lucknow and its report is Ex. Ka-13. Investigation of the case ended in charge sheet against the accused persons.

After committal case to the Court of Session, charges for the offence punishable under sections 302/34 and 506 IPC were framed against all the accused appellants who abjured their guilt and claimed trial.

4. IN order to substantiate its allegations and prove charge framed against the accused appellants, the prosecution has examined Smt. Renu Singh P.W-1, her son Chandra Prakash P.W-2, Ajay Kumar Singh P.W-3, scribe Vinay Kumar Singh P.W-4, Dr. Surendra Deo P.W-5, Constable Munnu Lal P.W-6, Head Constable Shyam Charan P.W-7 and S.O. Raghubir Singh P.W-8.

In their separate statements under section 313, Cr.P.C., all the accused persons in unison have denied the entire prosecution story and pleaded their false implication. Accused Onkar Mishra and Sanjay Mishra have stated that deceased Kapil Dev Singh owed money to several persons and had litigation with many people. The complainant usurped Rs. 20,000/- of their family which was taken by her for being invested in savings scheme. Accused Sadhu Sharan Yadav has stated that on account of enmity the deceased was killed by some unknown persons during night. At the time of alleged incident, he was present in the office of Sub-Registrar of Chauri Chaura for attesting a sale deed and from there he straight away went in the second marriage (Gauna) of his cousin and when returned next morning he came to know about murder of the deceased. In defence Kailash D.W.1 has been examined by accused Sadhu Sharan Yadav to prove his plea of alibi.

We have heard learned counsel for the parties at length and perused the original records of the case carefully.

5. LEARNED counsel for the appellant criticizing the impugned judgment and order have contended:

(i) that the F.I.R. was ante timed;

(ii) that there was no motive for Sanjay Mishra and Onkar Mishra for committing murder of the deceased because there was enmity between the family of the deceased and Sadhu Sharan Yadav;

(iii) that the incident has not taken place in the manner as alleged by the prosecution and presence of P.W. 2 and 3 at the spot is doubtful,

(iv) that the medical evidence does not support the alleged eye witness account of the incident, and

(v) that accused Sadhu Sharan Yadav was present in the office of Sub-Registrar, Chauri-Chaura on the alleged date and time, so he has been falsely implicated in the case.

6. THE prosecution has examined three witnesses of facts namely PW 1 to 3, scribe of the written report Vinay Kumar Singh PW 4. Dr. Surendra Dev PW 5 conducted autopsy on the cadaver of the deceased, which was brought by Constable Munnu Lal PW 6 in sealed condition on 29.5.2001 after inquest and produced the same before him. On 30.5.2001 for post-mortem examination. H.C. Shyam Charan PW 7 has prepared check report Ex. Ka-3 on the basis of written report Ex. Ka-1 of PW 1 and registered the case at crime no. nil at out-post Barhi P.S. Jhagaha. S.O. Raghubir singh PW 8 is investigating officer of the case. Accused Sadhu Sharan Yadav has examined Kailash DW 1 to prove his plea of alibi. The place of occurrence is in front of house of Balbhadra Kurmi situated in village Barahi and the house of the deceased is situated in south-west of the place of incident. Role of catching hold the deceased at the time of incident had been assigned to accused Sadhu Sharan Yadav and Sanjiv Misra, while accused Onkar Misra allegedly fired single gun shot from point blank range on the deceased causing his instantaneous death.

We would deal with the arguments advanced by learned senior counsel of the appellants in seriatum. The alleged incident took place at 5.15 p. m. and its written report was lodged at 5.45 p. m. in police out-post Barhi, which is at a distance of only 1/2 kilometers from the place of incident. On the face of it, the report is very prompt. However, the learned counsel for the appellants has laid great emphasis on the fact that no crime number was noted on the check report at out-post Barhi, which is reporting out-post and crime no. 210/2001 u/s 302/506 IPC was noted at P.S. Jhagaha. He further contended that being reporting out-post crime number is entered on every report of cognizable offence. A certified copy of FIR of case State Vs. Ganesh and others u/s 304- B IPC had been filed to show that the report of this case was registered at out- post Barhi and crime number 19/97 was given. In this connection learned AGA has drawn our attention to the statement of HC Shyam Charan PW 7 who had been cross-examined by the defence in this regard. He has stated that crime number 'nil' is noted at the out-post and crime number is allotted by the police station. He has further stated that only serial number is given in the crime register of the out-post, however, he could not state the serial number of the instant FIR. After gruelling cross-examination on this point, the witness has stated that on every report of cognizable offence registered out-post Barhi crime no. 'nil' is being noted. No specific question with regard to above check report of crime no. 19/97 was asked from the witness by the defence counsel. In the absence of any cross-examination from the Head Moharrir, who was suitable person to satisfy the query of the defence counsel, no adverse inference can be drawn by the Court on this count. The controversy in question has been resolved by S.O. Raghubir Singh PW 8, who was investigating officer of the case and the then Station Officer of P.S. Jhagaha. He has stated in cross-examination that in reporting out-post Barhi crime register and GD are being maintained. Report of cognizable offences are registered there, but crime number is allotted later on at the police station. He has specifically stated that reporting out-post had no crime number of its own. The case is registered at crime number 'nil' there and when check report is received at police station, crime number is allotted. Even to this witness, the certified copy of check report of crime no. 19/97 u/s 304-B IPC was not put by the learned counsel for the defence. Thus, it is established from the evidence on record of the case that no crime number is allotted by the reporting

out-post and there the report of cognizable offence is registered at crime number 'nil' and later on crime number is allotted by the police station concerned.

S.O. Raghubir Singh PW 8 has stated that on getting the information regarding registration of the case through R.T. set he reached at the spot, recorded the statement of complainant Renu Singh and after appointing panchas he dictated the inquest report to SI R.C. Yadav which has been proved by the witness as Ex. Ka-5. A perusal of the inquest report shows that the inquest proceedings started from 7.30 p.m. on 29.5.2001 and were completed by 8.30 p.m. the same evening. The copy of check report, copy of GD (regarding registration of the case) and other annexures were sent along inquest report and sealed cadaver of the deceased for autopsy through Constable Munnu Lal PW 6. The crime number and sections of offence have been noted on each the paper relating to inquest proceedings. There were eight enclosures with the inquest report and in post-mortem report Ex. Ka-2 the doctor has noted that along with post-mortem report nine enclosures are being sent to SSP apart from the articles recovered from the dead body of the deceased and his wearing apparels in sealed covers. Thus, from these papers it cannot be said that the written report was not lodged at the time given in Ex. Ka-3. Thus, the external checks available on record dislodge the argument of the learned counsel for the appellants regarding ante-timing of the FIR. We find that the instant FIR is very prompt. It is trite law that prompt reporting of the crime in criminal trial particularly of heinous case like the present one is of great importance as it rules out the possibility of concocting the FIR with consultations, manipulations and deliberations. Such report can be taken into consideration for corroborating the prosecution story.

7. MOTIVE Learned counsel for the appellants has vehemently argued that there was no motive for the accused particularly for Onkar Misra and Sanajay Misra to kill the deceased and they have been falsely indicted in the case as the deceased had usurped money of several persons which were given to him for investment and further he had litigations with several other people, who were enraged with him and some one from them had eliminated the deceased. It has been further contended that the complainant was running Fair Price Shop which was in the name of Radhey Shyam Singh and she had committed number of irregularities in

running this shop. Accused Sadhu Sharan Yadav being Pradhan of the village had filed complaints against her. Enmity is double edged weapon. If it prompts any one to commit the crime then on the other hand it works as a catalyst to falsely rope in an innocent person.

Motive is not a sine qua non for the commission of a crime. Moreover, it takes a back seat in a case of direct ocular account of the commission of the offence by a particular person. In a case of direct evidence the element of motive does not play such an important role as to cast any doubt on the credibility of the prosecution witnesses even if there be any doubts raised in this regard. If the eye-witnesses are trustworthy, the motive attributed for the commission of crime may not be of much relevance. Failure to prove motive or absence of evidence on the point of motive would not be fatal to the prosecution case when the other reliable evidence available on record unerringly establishes the guilt of the accused. Nowadays murders are being committed on very trivial matters. So far as the motive and its sufficiency for a crime of this diabolical nature such as the instant case, is concerned, the Apex Court in the case of *Ranganayaki v. State* (2004) 12 SCC (Crl.) has held as under:

"The motive for doing a criminal act is generally a difficult area for the prosecution. One cannot normally see into the mind of another. The motive is the mind which impels a man to do a particular act. Such impulsion isneed not necessarily be proportionally grave to do grave crimes. Many murder has been committed without any known or prominent motive. It is quite possible that the aforesaid imputing factor would remain undiscovered"

In this connection, following observations of the Hon'ble Supreme Court given in the case of *Thaman Kumar v. State of Union Territory of Chandigarh* 2003 (47) ACC 7 (SC) are also relevant:

"There is no such principle or rule of law that where the prosecution fails to prove the motive for commission of the crime, it must necessarily result in acquittal of the accused. Where the ocular evidence is found to be trustworthy and reliable and finds corroboration from the medical evidence a find of guilt can safely be recorded even if the motive for the commission of the crime has not been proved."

8. THE oral and documentary evidence available on record clearly indicate that all the accused persons were inimical to the deceased. Moreover in the instant case we have direct ocular evidence of the crime, so the motive takes back seat. No doubt through documentary evidence the defence has tried to say that the deceased was having civil litigation with many persons, so he has a long list of his enemies. The documents filed by the defence show that civil litigations were pending for decades. Thus, whatever motive has been alleged by the prosecution against all the accused persons stands fully proved.

The REAL INCIDENT AND PRESENCE OF EYE WITNESSES

Before dealing with the manner of incident and presence of PW 2 and PW 3 it would be proper to ascertain the place and time of incident. The alleged time of incident is 5.15 p.m. and its report has been lodged at out-post Barhi, which is situated in the village of incident. We have already dealt with the point of lodging the report at out-post Barhi earlier and with the help of evidence on record have concluded that the report was registered at the time given in the check report and crime no. was later on allotted by P.S. Jhagaha. The consistent case of the prosecution is that the incident took place in front of the house of Balbhadra Kurmi, which is situated in north-west of the house of the complainant and is ahead of village market. The investigating officer has found blood stained earth at the spot who visited there soon after the registration of the case on getting information of the incident through R.T. Set. The sample of plain and blood stained collected by PW 8 from the spot was sent for examination to FSL, Lucknow who have found human blood therein. Learned counsel for the appellants has argued that no memo regarding vegetables purchased by the deceased and lying at the spot was prepared by PW 8, which creates doubt about the place of occurrence. It is true that no memo about the vegetables lying at the ground on the spot was prepared by the IO although PW 8 has testified in cross-examination that vegetables were lying there but no memo was prepared as he did not think it proper. The explanation of PW 8 may not be satisfactory, but this lapse does not create any doubt about the place of occurrence. The witnesses of fact namely PW 1 to PW 3 have also vividly fixed the place of occurrence. Thus, the prosecution has been able to prove the time and place of incident.

In the written report the complainant has stated that her husband Kapil Deo Singh was returning from market after taking vegetables along with his son Chandra Prakash PW 2 and nephew Ajay Kumar Singh PW 3 and when they reached near the house of Balbhadra Kurmi, the accused persons who were already hidden there accosted the deceased and sharing common intention killed him by causing fire-arm injury. The investigating officer has recorded the statements of PW 2 and PW 3 on 30.5.2001, thus there is no delay in interrogation of the eye-witnesses. PW 2, the son of the deceased was aged about 13 years and Ajay Singh PW 3, the nephew of deceased was 16-17 years old at the time of incident. Both these witnesses have been subjected to grilling cross-examination about their going to market for purchasing vegetables with the deceased and presence at the spot, but nothing adverse could be elicited by the defence counsel, which may throw a shadow of doubt on the veracity of their testimony. Ajay Singh PW 3 has stated that they have separate kitchen in the other portion of the house of the deceased and he had also purchased vegetables for him. Thus, the presence of PW 2 and PW 3 along with the deceased at the time of incident is established.

9. PW 2 and PW 3 have spoken about the manner of incident. They have in unison stated that the accused Sadhu Sharan Yadav and Sanjay Misra caught hold the hands of the deceased, while accused Onkar Misra fired shot by putting the country made pistol on his face. Chandra Prakash PW 2 has stated.

"HINDI"

Almost similar statement had been given by Ajay Kumar Singh PW 3 in his examination-in-chief, which reads, thus -

"HINDI"

The above statements of eye witnesses find full corroboration from the medical evidence. Dr. Surendra Deo PW 5 in his report dated 30.5.2001 has found blackening and charring around the single fire-arm ante-mortem injury found on left side of face of the deceased. There was no exit wound and 13 metallic small pellets two pieces of plastic wadding were found from the base of skull which was also fractured. He has further stated that the fire-arm injury could be caused by

putting the weapon on the face and the deceased could suffer instantaneous death. Nothing adverse could be found in the cross-examination of Dr. Surendra Deo. Thus the ocular account of the incident is fully supported by the medical evidence.

10. ALIBI OF ACCUSED SADHU SHARAN YADAV Alibi is not an exception (special or general) envisaged in the IPC or any other law. It is only a rule of evidence recognized in S. 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant. The Latin word "alibi" means "elsewhere" and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and had participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter evidence to the effect that he was elsewhere when the incident took place. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. In such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi.

Accused Sadhu Sharan Yadav in his statement u/s 313 Cr PC has stated that at the time of alleged incident, he was present in the office of Sub- Registrar of Chauri Chaura for attesting a sale deed and from there he straight away went in

the second marriage (Gauna) of his cousin and when returned next morning he came to know about murder of the deceased. In defence Kailash D.W.1 has been examined to prove this plea of alibi. This witness has stated on 15.3.2003 that about two years ago he got a sale-deed executed from Nebu Lal, Ram Darash and Ram Sarikh in the office of Sub-Registrar, Chauri-Chaura, which is about 25 kms. from Barhi. In the sale deed Sadhu Yadav Pradhan and other people of village were witnesses. They reached office of Sub-Registrar at about 12-12.30 p.m. with Sadhu Yadav and vendors. The sale-deed was presented before the Sub-Registrar at about 4 p.m. and at that time Sadhu Yadav and vendors were present in the office with him. Since there was too much crowd and many documents were presented, so they stayed for about 1-1 1/2 hour and thumb impressions of witnesses were obtained on the sale-deed there. They came out from the office at about 5 p.m. and thereafter he along with Sadhu Yadav had boarded the bus of barat (2nd marriage-Gauna) of cousin of Sadhu Yadav on the road in front of office of Sub-Registrar and left for Gangyarpur. They returned from there the next day and then came to know that in the night Kapil Deo Singh had been killed by some one. As already observed before, deceased Kapil Deo Singh was killed at about 5.15 p.m. on 29.5.2001. The copy of sale deed of Kailash had been filed by the defence, which shows that the document was presented in the office of Sub-Registrar at about 4 p.m. If for the sake of argument it is accepted that accused Sadhu Yadav had witnessed the sale deed of Kailash DW 1 on the day of incident, even then the distance of the office of Sub- Registrar, Chauri-Chaura is not so much that it was impossible for Sadhu Sharan Yadav to be on the scene of occurrence at the time of incident. He could have easily attend the 2nd marriage of his nephew in Gangiyarpur after the incident, which is only 10 kilometers from village Barhi. In view of the nature of evidence available on record, we find that the defence has miserably failed to prove the alibi plea of accused Sadhu Sharan Yadav.

In view of the foregoing reasons, we are of the opinion that the prosecution has successfully proved its case beyond reasonable doubt and the accused-appellants were rightly held guilty for committing murder of the deceased in broad-day light in furtherance of their common intention. The appeals have no force and are accordingly dismissed.

11. THE Amicus Curiae Mr. Sanjeev Misra, Advocate appointed by this Court would get Rs. 2,100/ each, which shall be paid to them in a month.

Let certified copy of the judgment be sent to the Court concerned for compliance, which shall be communicated to this Court within two months positively.

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