

**Shree Dev Vs. State of U.P.**

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**Court :** Allahabad

**Decided On :** Sep-27-2012

**Judge :** A.K. Sharma & Rakesh Tiwari

**Appeal No. :** Criminal Appeal U/S 374 Cr.P.C. No. 340 of 1997

**Appellant :** Shree Dev

**Respondent :** State of U.P.

**Judgement :**

Anil Kumar Sharma, J.

1. THE appellants have challenged the judgment and order dated 20.01.1997 passed by Sessions Judge, Etah in Sessions Trial no. 17 of 1993, whereby appellant Shree Dev has been convicted for the offences punishable under sections 147, 302/149 IPC and has been sentenced to undergo two years R.I. and fine of Rs. 2,000/- under section 147 IPC and imprisonment of life under section 302/149 IPC. THE rest of the appellants have been found guilty for the offences punishable under section 148 and 302/149 IPC and each of them has been sentenced to undergo two years R.I. and fine of Rs. 2,000/- under section 147 IPC and imprisonment of life under section 302/149 IPC. In default of payment of fine each accused appellant has been directed to undergo R.I. for two months.

2. FACTS germane to this case are that in Mohalla Chaudah Paur, Kasba and P.S. Soron, District Etah (now district Kanshi Ram Nagar) accused Sridev,

deceased Satya Narayan and Laxmi Narayan were three real brothers. Laxmi Narayan, the younger-one has no issue so he has executed a will in favour of Satya Narayan's sons. The appellants were enraged with this disposition of the property by Laxmi Narayan and several cases were pending between them. It was alleged that on 08.09.1992 at about 4.30 P.M. deceased Satya Narayan along with Sarvan Kumar and brother Laxmi Narayan as per daily routine after easing themselves came on Ganga Ghat near Ambhagarh Akhada for taking bath and at the same time from the side of Dhimaro Ka Mohalla Bholi Shankar and Kuldeep Tiwari arrived there and talking each other they reached the temple of Goverdhan Nath Ji. In the meantime, from south side (Tulsi Park) Sridev s/o Ram Pratap and his four sons Munna Lal, Raju, Nityanand and Uchchav @ Pappu, Mohalla Chaudah Paur, P.S. Soron armed with Kanta, knives and country-made pistol reached near Satya Narayan and they all catching him started assaulting with Kanta and knife. On the shrieks of his father Sravan Kumar and others reached towards him and saw that Nitya Nand fired from his country made pistol and all the accused persons made their escape good towards south-west side. It was found that Satya Narayan succumbed to the injuries on the spot. The written report of the incident scribed by Kuldeep Kumar Tiwari was submitted by Sravan Kumar s/o deceased at 5.10 P.M. the same day at P.S. Soron and he alleged that due to enmity on account of old litigation the accused persons have assaulted the deceased. On the basis of written report case crime no. 237/92 was registered at P.S. Soron under sections 147, 148, 149 and 302 IPC, investigation whereof was entrusted to S.I. D.D. Prajapati. After interrogating the complainant at police station the Investigating Officer reached at the spot, prepared inquest of the corpse of the deceased. He collected the plain and blood stained sample of cement concrete and sealed into two different containers vide memo Ex. Ka-13. The stick of the deceased was found floating in Gangaji and the same was also seized per memo Ex. Ka-14. Thereafter inquest on the dead body of the deceased was performed and his cadaver was sent for post mortem examination in sealed cover. Dr. Satya Mitra, PW-3 conducted autopsy on 09.09.2012 at 12.30 P.M. He found that 60-years' old deceased was average built with normal muscularity. Rigor Mortis was present in upper as well as lower extremities. Abdomen and scrotum were distended. Dr. Mitra found the following ante mortem injuries on the

person of the deceased:

1. Incised wound 10 cm x 1 cm x brain matter deep over right side and back of head at left of back of upper end of right external ear. Skin muscle (scalp) bone meninges and brain cut.
2. Multiple incised wound in an area 10 cm x 7 cm on the right side cheek and upper part of neck measuring 1 cm x 0.3 cm muscle deep to 3 cm x 0.7 cm x bone deep. Mandible on right side fractured.
3. Stab wound 3 cm x 1 cm x thoracic cavity deep over right side lateral side of chest 8 cm below axillary crease. On dissection sub costal muscle underlying rib, pleura right side, Lung right side, cut direction right to left transverse.
4. Stab wound, 3.5 cm x 1 cm x thoracic cavity deep on left side chest 6 cm below left nipple. Skin, muscle underlying the 8th rib, left pleura, left lung and pericardium part are cut. Direction left to right and slightly upwards.
5. Multiple incised wound in an area 10 cm x 5 cm on the left side chest above nipple measuring 2 cm x 0.3 cm x skin deep to 3 cm x 0.5 cm x muscle and rib deep.
6. Multiple incised wound over back of chest in an area 20 cm x 20 cm from base of neck above measuring 2 cm x 0.2 cm. Muscle deep to 3 cm x 0.5 cm x thoracic cavity deep. Right scapula cut. Right pleura and right lung cut at places.
7. Multiple incised wound in an area 10 cm x 6 cm over front and external aspect of left upper arm 3 cm below the left shoulder joint.

In the opinion of the doctor the deceased suffered death about a day before due to haemorrhage and shock, as a result of ante mortem injuries. The investigation Officer prepared the site plan of the scene of occurrence, interrogated the witnesses and after completion of investigation submitted charge sheet against all the five named accused persons.

After committal of the case to the Court of Session, the Sessions Judge, Etah framed charges under sections 147 and 302/149 India Penal Code against

accused Sri Dev and remaining accused persons were charged for the offences punishable under sections 148, 302/149 Indian Penal Code. All the accused persons abjured their guilt and claimed trial.

In order to prove its case the prosecution had examined the complainant Sravan Kumar PW-1, Bholu Shanker PW-2, Dr. Satyamitra PW-3, S.I. Ramesh Chandra Sharma PW-4 and S.I. D.D. Prajapati PW-5.

3. ALL the accused persons in their separate statement under section 313 Cr.P.C. have again denied the entire prosecution story as also the circumstances appearing against them and pleaded false implication on account of animosity. However, no evidence in defence was adduced by any of the accused.

In this appeal since inception as many as nine advocates have put in their appearance, but none had assisted the Court in the disposal of this old appeal, so we were constrained to appoint Sri Rahul Misra, Advocate as Amicus Curiae for the accused appellants. We have heard Sri Rahul Mishra, Amicus Curiae for the appellant and Sri Syed Ali Murtaza, AGA for the State and also carefully perused the original record of the case.

4. LEARNED counsel for the appellants criticizing the prosecution story has submitted-

that there was no motive for the accused to eliminate their blood relative Satya Narayan;

that FIR is anti-timed;

that the presence of eye witnesses is doubtful;

that no independent witness has been examined;

that the prosecution has improved its version as contained in the FIR.

On the basis of above arguments learned Amicus Curiae for accused- appellants has contended that the prosecution has not been able to bring whom the guilt to the accused persons so they are liable to be acquitted on all counts.

Per contra learned AGA for the State supporting the findings recorded by the Sessions Judge has submitted that FIR of the incident has been promptly lodged with the police wherein apart from names of accused, their role, weapons used, names of witnesses, and motive has also been mentioned; that ocular account of the incident finds full corroboration from the medical evidence, and that there is no material contradiction in the testimony of prosecution witnesses so the learned Sessions Judge has rightly recorded findings of conviction against the appellants and they have also been adequately sentenced, so the appeal deserves dismissal.

The homicidal death of deceased Satya Deo on account of ante- mortem injuries found on his person by the doctor during autopsy is amply proved through the statement of Dr. Satya Mitra, PW 3 and investigating officer D. D. Prajapati PW 5, who had prepared the inquest report from 5.45 p. m. to 7.10 p. m. on 7.9.1992 at the spot. In fact the homicidal death of the deceased has not been disputed on behalf of the appellants during the course of arguments, however, the contention of the learned counsel for the appellants is that the accused- appellants have been falsely implicated in the case on account of enmity between the parties.

5. THE following pedigree which has come in the cross-examination of PW 1 and is not disputed by the defence would facilitate in understanding their relationship and motive for the crime.

Ram Pratap

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Sri Dev Luxmi Narain Satya Narain

A-1 (Killed after incident) (Deceased)

Issue-less

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Munna Raju Nitya Uchchav Sarvan X Y

Lal A-2 A-3 Nand @ Pappu Kumar

A-4 A-5 Complainant

THE above pedigree clearly indicates that deceased was younger brother of accused Sri Dev and accused Munna Lal, Raju, Nitya Nand and Uchchav @ Pappu are his sons, while complainant Sarvan Kumar is son of deceased Satya Narain. The consistent case of the prosecution is that the younger brother of the deceased namely Luxmi Narain was issue less, he was residing with the deceased and he has bequeathed his property in favour of sons of the deceased. This is the bone of contention between the parties and they were litigating several cases on this score. In this connection the complainant has reiterated his statement in his cross-examination as well. No contra suggestion had been given to this witness on behalf of defence during his cross. Although the accused persons have denied any enmity on account of property of Luxmi Narain with the complainant and his family but at the same time have stated that they have been falsely roped in the case due to enmity and partibandi. In a criminal case accused is not required to explain the circumstances under which he has been implicated in the case, yet they ought to give some sort of reason for their false implication so that the Court may also examine the case from their point of view. On the contrary, on perusal of record we find that during trial on 15.12.1993, the complainant filed an application for taking appropriate action against Munna Lal and his sureties as the former has not surrendered in Court on due date in compliance of order this Court passed on his parole application on 7.10.1993. It was further stated that during the period of parole accused Munna Lal along with brother Nitya Nand and two named persons have killed witness Luxmi Narain with knives on 25.10.1993 at 6 p. m. An application for cancellation of bail of accused Nitya Nand was also filed by the complainant on 6.1.1994 making similar allegations regarding murder of Luxmi Narain. Surprisingly the State counsel conducting the case before Court of Session has not cared to ask from the complainant about this incident during his examination in the Court, which may have some bearing on this case and would have supplied sufficient explanation for non-examination of Luxmi Narain in the

instant case before the Court. In these circumstances, we find that there was sufficient motive for the accused to eliminate the deceased.

6. THE alleged incident took place at about 4.30 p.m. on 8.9.1992 and its written report was submitted by the complainant at P.S. Soron within an hour at 5.10 p.m. THE distance between the place of occurrence and the police station, as per check report Ex. Ka-5 is one kilometre. THE complainant has proved the written report as Ex. Ka-1 stating that it was scribed by Kuldip Kumar Tiwari on his dictation. He has further stated that it took about 10-15 minutes in getting the report prepared. He stayed at the spot for about half an hour and then went to police station in a rickshaw along with his uncle Luxmi Narain. There is no delay in reporting the crime to the police. Learned counsel for the appellant has contended that the FIR is anti-timed, but he could not supply any material for this preposition. He has laid emphasis on the statement of complainant wherein he has admitted the photo of Kuldip Kumar Tiwari affixed on an affidavit denying the story of scribing the report. It is true that the complainant has identified the photo of Kuldip Kumar Tiwari on affidavit Ex. Kha-1, wherein he has stated that on the day of incident he was not in Soron and has also denied his writing on written report. This affidavit was received in the Court by post. The accused could have examined him in defence, so that the prosecution could have get an opportunity to cross-examine him. Other witness Bhola Shanker PW 2 has also testified that the complainant got the written report scribed from Kuldip Kumar Tiwari. It clearly shows that this witness had been won over by the accused persons. THE incident was family dispute of complainant and accused persons, so no outsider would like indulge himself in their internal matter. Thus, the affidavit Ex. Kha-1 has no bearing in the case. THE written report was lodged in presence of SI D.D. Prajapathi PW 5, but no suggestion had been given to him during cross-examination that the report was anti-timed and not lodged at the time given on check report Ex. Ka-6. Further the check report Ex. Ka-4 and copy of GD regarding registration of case have been proved by Inspector Ramesh Chand Sharma PW 4, because the writer of these document had already expired. This witness has stated that in the month of September, 1992 he was posted as Inspector-in- charge of P.S. Soron. He has denied the suggestion that the report was lodged anti-timed. THE copy of check report and copy of GD were also sent by SI D. D. Prajapati PW 5 along with the

dead body of the after inquest for post mortem examination. In all the papers relating to inquest including the report the case crime no. and sections have been noted. No doubt the name of accused persons do not find place in inquest papers Ex. Ka-6 to Ka-11, but it is insignificant as the in proceedings u/s 174 Cr PC there is no requirement of law that names of accused should be mentioned. THE purpose of these proceedings is primarily to know the cause of death of concerned deceased. There is no over-writing or cutting in Ex. Ka-6 to Ka-11 with respect to crime number and sections of IPC under which the case has been registered. Thus, the external checks available on record also corroborates the prosecution version that the FIR was registered at the time given in check report Ex. Ka-6 and contention of appellants' counsel to contrary is fallacious.

Learned counsel for the appellants has vehemently argued that the presence of complainant at the spot is not proved as he has not tried to save his father during the incident; that he has not received any injury and his clothes were not stained with the blood of his father. Refuting these arguments, learned AGA has submitted that the deceased was brutally murdered by accused persons in broad day light and no one from the nearby could dare to intervene, so how it was expected from the complainant who was unarmed that he would take the courage to intervene. It has been mentioned in the FIR itself that when complainant and witnesses reached near the deceased, accused Nitya Nand opened fire to scare them away and thereafter the accused made to their heels from the spot. All the four sons of accused Sri Deo were armed with lethal weapons and the complainant or his associates were totally unarmed. In such a situation it was not expected from the complainant to jump into the melee without taking precautions for himself. We have already seen above that the report of the incident has been promptly lodged by the complainant after 40 minutes of the incident and this report is not anti-timed. Had the complainant been not present at the spot, then he could not have lodged the report so promptly as had been done by him in the instant case. The post mortem report of the deceased shows that he has received numerous incised wounds on his body and suffered instantaneous death, so there was no occasion for the complaint to come in close contact with the dead body of his father, because no urgent medical treatment was required. This witness has been cross-examined at length, but nothing adverse could be elicited by the defence counsel.

As regards Bhola Shanker PW 2, the contention of the learned counsel for the appellants is that there are two Bhola Shankers in the story, one is Brahim and the other Swarakar. The investigating officer has recorded the statement Bhola Shanker Swarnkar as eye witness, while the other was witness of inquest report. On perusal of the original record and case diary we find that a minor discrepancy has crept in due to clerical mistake of the investigating officer. In the inquest report Ex. Ka-6 name of Bhola Shanker Swarakar s/o Ram Babu has been noted while PW 2 Bhola Shanker Brahmin is son of Sia Ram. Both PW 2 and PW 5 have clarified this mistake and the investigating officer has admitted in cross-examination that inadvertently he had written the caste of Bhola Shanker s/o Sia Ram as Swarankar instead of Brahim. There is no mistake in writing the parentage of both the witnesses of same name. Both the witnesses of fact are Pandits and engaged in 'yajmani', as would appear from their own description given before the trial court at the time of their deposition. Soron in erstwhile district Etah now district Kashi Ram Nagar is well known place of Hindu pilgrims and round the year the thousands of devotees visit the place particular they take dip in the holy pond called 'Hari- ki-Pauri Gangaji'. The pandits of Soron during the day roam around this place in search of their clients (Yajmans). This observation is corroborated by Bhola Shanker PW 2 in his cross- examination. To quote his own words used - "

## LANGUAGE

"Learned counsel for the appellant has also raised doubt about the presence of witnesses on the ground that in the written report it has been mentioned that as usual the claimant, his father and uncle Luxmi Narain after easing themselves went at Ghat of Har-ki-Pauri Gangaji for bathe. He contended that the time of alleged incident is 4.30 p.m., which is not the usual timing for such activity of a human being. The argument has no force because no cross-examination has been done from PW 1 and PW 2 on this point. It may be because the counsel for the defence very well knew about custom of local people of Soron qasba who are engaged in Yajmani. In these circumstances, the presence of PW 1 and PW 2 is duly proved by the prosecution and there is no doubt about it.

Now as regards manner of assault the consistent case of the prosecution right from registration of the case is that the accused were armed with knife, country made pistol and kanta. Both the witnesses of fact have described the weapons carried by the accused persons at the time of incident. They have stated that accused Sri Dev was having a danda, Munna Lal and Uchchav @ Pappu had knives, Munna Lal was armed with kanta while Nitya Nand was armed with country made pistol. Role of exhortation had been assigned to accused Sri Dev. In Fir it is not mentioned that accused Sri Dev was having danda in his hand, but it makes no difference because the witnesses have not stated that this accused also assaulted the deceased with danda. Sri Dev was aged about 66 years, so he might be carrying danda in a routine manner and for this reason the complainant did not mention this fact in his written report. This fact has been fairly admitted by Sarvan Kumar PW 1 in his cross-examination. The doctor has found two stab wounds, one incised wound and four multiple incised wounds on the person of the deceased. All these injuries have been found on upper part of the body of the deceased and as per Dr. Satya Mitra PW 3 they could be caused by sharp edged weapons like knife and kanta etc. The place of occurrence is Har-ki-pauri Gangaji and the lower part of deceased dead body was in water and remaining on stairs. Perhaps on account of this fact the doctor has found abdomen and scrotum of deceased distended. Role of exhortation has been assigned to accused Sri Dev. This fact does not find mention in the written report, nor any of the witness of fact had stated so to the investigating officer. However, this fact alone is not sufficient to discard the otherwise reliable prosecution story which is well supported by medical evidence. Accused Sri Dev was the eldest member in the family and his presence at the scene of occurrence while his all four sons were assaulting the deceased with lethal weapons shows prior concert and meeting of minds. He reached at the spot together with other armed accused persons and left the place of occurrence along with them after killing the deceased, conclusively prove his active participation in the incident. We say so only for the sake of argument if we deduct the role assigned to accused Sri Dev. In the case of Om Prakash Vs. State of Haryana 2011 (6) Supreme 244, the Apex Court has again observed that every small discrepancy or minor contradiction which may erupt in the statements of a witness because of lapse of time, keeping in view the educations and other

background of the witness cannot be treated as fatal to the case of the prosecution.

7. THE enmity between the parties was so sore that after the incident on 25.10.1993 eye witness Luxmi Narain was killed and in this incident accused Munna Lal and Nitya Nand and their two other associates were named as accused. Soron is a qasba and not a big city, therefore, generally people know each other. The other people were knowing the nefarious activities of the accused, then who would dare to depose against them in the Court and perpetrate enmity with them. In this connection we can usefully refer to the latest decision of the Apex Court rendered in the case of Mahesh Vs. State of M.P. 2012 Cri LJ 2710. In para-17 of the report, following observations have been made:

"17. THE prosecution has examined at least three eye- witnesses to the occurrence of the incident who have stated as to how the incident had happened. They have also stated the different and various roles played by the accused persons. Since eye-witnesses were available and examined, there was no necessity of examining any other witness, inasmuch as, there is no necessity for the prosecution to multiply witnesses to prove and establish the prosecution case. There is no requirement in the law of evidence that any particular number of witnesses is to be examined to prove something. THE evidence has to be weighed and not to be counted. The witnesses who were examined were relatives of the deceased and, therefore, there is no ground and reason why they should be disbelieved. There is also no reason why they would not speak the truth so as to see that the actual guilty persons are convicted."

In the instant case the prosecution has examined Bhola Shanker PW 2 who is quite natural, neutral and independent witness. Learned counsel for the defence could not elicit from him during cross-examination, which may show that he is friendly with the complainant's family and is inimical towards the accused persons. Even no suggestion worth name had been given to him in the cross-examination for his reason to depose against the accused persons and for the prosecution. He is also engaged in 'yajmani' and was present at the spot during evening hours in search of his 'yajman', because that was his livelihood. His presence on the scene

of occurrence at the time of incident has not been challenged by the defence during cross-examination. We may also observe that as per prosecution story accused Nitya Nand was having country made pistol at the time of incident. THE complainant has not stated that he fired shot in order to kill him or the other witnesses. This conduct of the complainant shows his bonafides. He has simply stated that fire was made only scare them away. In order to make out a case of attempt on their lives he could have spun a story of making fires by Nitya Nand on them with an intention to kill them., so that a case u/s 307 read with 149 IPC was also made out. Thus we find that PW 1 and PW 2 have duly proved the incident as also the role of each accused.

There is no contradiction between the ocular and medical evidence. Dr. Satya Mitra PW 3 has in very unequivocal terms has stated that the ante-mortem injuries found on the person of the deceased could be caused by sharp edged weapons like knife and kanta. Both the eye witnesses have also stated that the deceased was assaulted by knives and kanta. They have not improved their version which was taken at the earliest opportunity as noted in the promptly lodged written report. Thus, we find that eye witness account of the incident is fully corroborated by the medical evidence and there is no discrepancy at all.

8. IN view of what has been said and done above, we find that the prosecution has proved its case beyond all reasonable doubt against each accused and so accused Sri Dev is liable to be convicted for the offence punishable u/s 147, 302/149 IPC and the remaining accused were rightly found guilty for the offences punishable u/s 148 and 302 read with section 149 Indian Penal Code by the Sessions Judge. The sentences awarded are also appropriate. The appeal has no force and is accordingly dismissed. The impugned judgment and order of the Sessions Judge are hereby confirmed.

Sri Rahul Misra, Amicus Curiae has provided good assistance to the Court in disposing of this old appeal. He would get remuneration of Rs. 2,100/-, which should be paid in a month.

Let a certified copy of the judgment be sent to the court concerned immediately for ensuring compliance which should be reported to this Court within two months.

