

**Fakira Vs. State**

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**Court :** Allahabad

**Decided On :** Sep-12-2012

**Judge :** Sudhir Agarwal

**Appeal No. :** Criminal Appeal U/s. 374 CR.P.C.No. 3078 of 1981

**Appellant :** Fakira

**Respondent :** State

**Judgement :**

Sudhir Agarwal, J.

1. Fakira and his two sons Rajvir and Sheoraj were tried in Sessions Trial No. 214 of 1980 before Sri Y.C. Raizade, IV Additional Sessions Judge, Bulandshahr for the offences under Sections 307 and 323 read with Section 34 IPC. By the impugned judgment and order dated 11.12.1981 they have been convicted and sentenced to undergo five years' RI under Section 307 IPC and six months' RI under Section 323 read with Section 34 IPC. Both the sentences were made to run concurrently.

2. Criminal Appeal 3078 1981 was filed on 14.12.1981 and was admitted by Hon'ble M. Katju, J. (as his Lordship then was) and Criminal Appeal No. 3059 of 1981 was filed on 21.12.1981 and though there was an office report that it is a duplicate criminal appeal by the same three accused appellants, it was also admitted on the same day, i.e., 21.12.1981 by his Lordship Hon'ble M. Katju, J.(as

His Lordship then was). The subsequent appeal being Criminal Appeal No. 3059 of 1981 against the same judgment and order, having been filed by the same parties, obviously is not maintainable and this is also not disputed by Sri J.S. Chandel, learned counsel appearing for the appellants. He has advanced arguments in Criminal Appeal No. 3078 of 1981.

3. Further Chief Judicial Magistrate, Bulandshahr submitted his report dated 18/19.10.2006 that Fakira son of Ram Saran has already died. This fact has also been stated by learned counsel for the appellants. The appeal, therefore, survives only in respect of Appellants No. 2 and 3, namely, Rajvir and Sheo Raj, both sons of Fakira and stands abated against the appellant no.1, i.e., Fakira son of Ram Saran.

4. The relevant facts in brief are : The incident took place on 11.7.1978 at about 2 PM, when Court Amin Sri Bal Kishan along with his peon Dilip Singh had gone to Syana for executing Court's order for delivering possession of plot no.2675 measuring 8 Bighas and 19 Biswans to auction purchaser Sri Omkar Prasad who was accompanied by Rajnish. While the Amin was counting trees standing in the plot, Sheoraj armed with Pharsa and Rajvir and Fakira with lathi came from behind and assaulted Omkar Prasad. Fakira was also exhorting to kill the victim Omkar. Rajnish came to rescue but sustained lathi injuries. On alarm being raised, witnesses Khalilul Rehman, Vinit Kumar and Jagdish Singh arrived and intervened. As a result of injuries sustained by Omkar Prasad, he fell unconscious.

5. First information report of the incident scribed by Rajendra Rastogi on the dictation of Rajnish was lodged at Police Station Syana, District Bulandshahr at 3.30 PM same day; distance of police station being 3 furlongs from the place of incident. Formal check report was drawn by the concerned Head Moharrir and a case was registered at case crime no. 125 in the G.D.

6. Injured Rajnish Kumar was medically examined by Dr. Indra Sen, PW 6 at Primary Health Centre, Siana. He found following injuries on his person:

1. Bruise all over on front aspect of left little finger terminal of phalanx 1 cm X 1 cm. Colour pinkish.

2. Bruise 4 cm x 1 cm on the front or middle aspect of left ring finger, pink in colour.
3. Bruise 1 cm x 1 cm on the middle phalanx of front aspect of left hand on the middle finger, pink in colour.
4. Bruise all over 2 cm x 1 cm on the pulp of left index finger pink in colour.
5. Bruise 3 cm x 2 cm on the pulp i.e., terminal phalanx of left thumb front aspect, red in colour.
6. Bruise 5 cm x 2 cm on the front of palm below index and middle fingers, pink in colour.
7. Bruise 3 cm x 2 cm just below the lower angle of right shoulder wing, pink in colour.

7. Injured Omkar Prasad being unconscious was referred to the District Hospital where he was admitted and his medical examination could be conducted, the next day, at 11 A.M., by Dr. P.C. Aggarwal, PW 7. Following injuries were found on his person:

1. Incised wound 6 x 1 cm x bone on the right side scalp, 8 cm above right ear with regular margins and blood clot. Oozing of blood found present.
2. Incised wound 8 cm x 1 x bone on the right scalp 1 cm behind (posterior) injury No. 1. Blood clot and fresh blood oozing. Margins regular.
3. Diffuse contusion over right upper eye lid.
8. Investigation was undertaken by I.O. Balbir Singh who collected blood stained and ordinary earth from the spot, prepared site plan, interrogated the witnesses and finally submitted chargesheet against the accused under the offences as aforesaid.
9. The prosecution, in all, examined 9 witnesses out of which , PW 1 Omkar Prasad victim, Khalilul Rehman PW 2, Jagdish Singh, PW 3 and Bal Kishan

Saxena are eyewitnesses and witnesses of fact. Rest are formal witnesses including Investigating Officer, Doctors who examined the injured and Pharmacist etc. Rajnish having died in the meantime was not examined.

10. Defence of accused appellant in their statement under Section 313 Cr.P.C. was denial and false implication owing to litigation in Court.

11. On scrutiny of evidence, learned Trial Judge convicted the accused appellants and awarded sentence as above by the judgment and order impugned in this appeal.

12. I have heard Sri Jai Singh Chandel learned counsel appearing for the accused appellants and Sri Sudhir Mehrotra, learned AGA representing the State.

13. Learned counsel for the appellants made his sincere endeavour to assail the judgment of Trial Court mainly on the ground that there is apparent contradictions and discrepancies in the statement of witnesses which show serious holes/gaps in prosecution story and in view thereof it cannot be said that the appellants are the persons who have committed the alleged offence. To substantiate his arguments, he drew attention of this Court to the first information report stating that Sheoraj attacked Omkar Prasad with Pharsa and Rajvir and Fakira assaulted him with lathis. The author of FIR namely, Rajnish Kumar son of Har Saran Das claimed to have accompanied Omkar Prasad and when the two raised alarm, Khalilur Rehman son of Chhidde Khan, Vinit Kumar son of Nand Kishore and Jagdish Singh son of Sardar Singh arrived at the place of incident and tried to intervene and rescue Omkar Prasad. Rajnish also sustained injuries of Lathi while attempting to save Omkar Prasad from the aforesaid assault who could be saved with great difficulty. He (Omkar Prasad) fell unconscious and taken to police station where report was lodged.

14. So far as injuries sustained by Omkar Prasad are concerned, learned counsel did not dispute that the same were caused by sharp edged weapon but he concentrated more on the medical report of Rajnish Kumar and contended that injuries sustained by him on his fingers and hand though are proved to have been caused by a blunt object but they could have been caused artificially by Rajnish

Kumar himself.

15. Next Sri Chandel placed before the Court statement of Omkar Prasad PW 1 and pointed out that he was accompanied by three more persons, namely, Rajnish, Amin and peon. The three accused appellants continued to assault and beat him for about 2- 3 minutes, yet he did not fall unconscious immediately due to injuries but it so happened after about half an hour. He contended that two or three minutes continuous beating would have been sufficient to cause much more serious consequences but that had not happened and this shows falsity of the report and statement and there is an element of exaggeration. The place of incident where he was assaulted is said to be a sugarcane field. PW 1 also denied of having any financial transaction with Rajvir or Sheoraj though he had old acquaintances with the three accused appellants.

16. Sri Chandel then placed statement of PW 2 Khalilur Rehman, and pointing out that his version is a bit different, said that Omkar Prasad fell and became unconscious after sustaining injuries in Chari (fodder) field. The PW 2 said that the incident took place in vacant field of Sheoraj though after sustaining injuries Omkar Prasad fell in the field and became unconscious. It is contended that about place of incident there is self contradiction besides being inconsistent to the version of PW 1. The discrepancy about the condition of Omkar Prasad after sustaining injuries whether he fell unconscious immediately or not, the issue was highlighted by learned counsel to contend that prosecution story is not consistent and uniform and therefore does not inspire confidence.

17. PW 3 Jagdish Singh son of Sardar Singh though claimed to have known Fakira and his son Sheoraj but could not tell the name of another son of Fakira. He, however, said that Omkar Prasad, Rajnish and Amin were standing in a vacant field of Fakira.

18. Then Sri Chandel placed in extensio deposition of PW 4, Sri Bal Kishan, Court Amin who had accompanied the victims on 11.7.1978 when the incident took place. PW 4 deposed that two people attacked Omkar Prasad and third one was shouting to kill him. One of the assailants had Pharsa in his hand and another was having a lathi. Sheoraj was having Pharsa and Rajvir was armed with lathi and

third accused Fakir was shouting to kill him. The witness, PW 4 had accompanied Omkar Prasad and Rajnish Kumar along with his peon to police station and himself prepared the report seeking police help. According to him, Ranish Kumar did not lodge any report at police station.

19. Other witnesses are formal official witnesses. PW 5 Rajendra Rastogi is the persons who scribed the report and has proved the same in Court. PW 6 is Dr. Indra Sen, who conducted medical examination of Rajnish and had referred Omkar Prasad, who had received severe injuries and was in unconscious state, to District Hospital, Bulandshahr. PW 7 is Dr. P.C. Agarwal who treated and conducted medical examination of Omkar Prasad. There are two more witnesses namely, PW 8 Investigating Officer SI Balbir Singh who conducted investigation in the case and PW 9 Mr. S.S. Saxena, Chief Pharmacist, District Hospital, Bulandshahr who produced and proved hospital record where Omkar Prasad underwent treatment. Out of testimony of the aforesaid formal witnesses, learned counsel for the appellants placed before this Court the statement of PW 7 Dr. P.C. Agarwal only to show that he did not find injuries of Omkar Prasad serious enough to prove fatal.

20. Pointing out the aforesaid discrepancies, the learned counsel for the appellants contended that they are quite substantive and serious, rendering the prosecution story improbable and self contradictory, raising reasonable doubt on the prosecution version, hence, benefit thereof should be given to the appellants.

21. From the above discussion and perusal of record, certain facts which remain uncontroverted and undisputed are : Four persons namely, Omkar Prasad, Rajnish Kumar, Court Amin Bal Kishan and his peon Dilip Singh went to plot no. 2675 measuring about 8 Bighas 19 Bishwas, for giving possession thereof to Omkar Prasad at near about 2 P.M. on 11th July, 1978 . The exact timing can reasonably have some difference since it is not expected that a person on every occasion and at every time and moment would be watching clock particularly when he is not aware or conscious that such timing may attain some importance in future. No one can be expected to forecast or foresee any incident likely to occur in future. Therefore, in the FIR time has been mentioned about 2 PM while in the

statement of PW 4 it is about 1.30 PM. The proximity of time in the statements of various witnesses is around 2 PM. PW 2 has said that he heard alarm at about 2 PM. Similar is the statement of victim Omkar Prasad PW 1. Minor variations in the matter of time would make no difference in this matter particularly when actual incident has not been shown to have actually not taken place on the date, time and place, as said above. The witnesses are uniform in saying that Omkar Prasad was assaulted with Pharsa and lathi. Sheoraj attacked Omkar Prasad with Pharsa and Rajvir attacked with lathi is also consistent stand of all the witnesses who were or came to be present at the place of occurrence at the time of incident.

22. Much has been argued whether incident took place in a vacant field or a sugarcane field or field with Chari. It is not in dispute that the victims and others had not gone to the site where incident took place to find out the kind and nature of crop sown thereat or to find out the nature of soil etc. In execution proceedings of the Court, field of accused appellants was auctioned and Omkar Prasad was the auction purchaser. The Court Amin along with peon had gone there to give possession of auctioned property to Omkar Prasad.

23. The accused appellants admittedly own agricultural land which was auctioned. Here is not a case where prosecution had attempted to show that assault on Omkar Prasad and Rajnish was the result of some old enmity etc. On the contrary, the accused appellants appears to be enraged due to auction of their agricultural land, and to prevent auction purchaser from taking possession thereof, assaulted Omkar Prasad and his companion Rajnish Kumar (who came to his rescue). The attack, therefore, was pre planned only to this extent that whosoever shall come to take possession, shall be taught a lesson and there could have been anyone other than these two victims. For the accused appellants it was not material as to whom they had to attack but what is evident and apparent from the record is that their target was the person(s) who had purchased their agricultural land in auction and would be coming to take possession thereof. Thus the fact that the assault was pre-planned is clearly proved from the sequence of incident. The presence of accused appellants on 11th July 1978 at the place of incident and attack on Omkar Prasad has been proved and nothing is placed to persuade this Court to take a different view. Companion Rajnish Kumar also sustained injuries while trying to

rescue Omkar Prasad from accused appellants. This is also clear from the evidence as discussed above. The basic facts are common and consistent in statements of all the witnesses of fact and there is no material discrepancy at all. The alleged discrepancy regarding nature of crop, if any, in the field or not, does not change impact of basic facts which are found proved from consistent and uniform testimony of all witnesses of facts and also the fact that Omkar Prasad sustained serious injuries, fell unconscious due to those injuries and remained under treatment in District Hospital, Bulandshahr for about 20 days and more.

24. While examining statement of witnesses it is not every I's, T's and dots which have to be seen and considered with mathematical accuracy or that any minor, ineffective or insignificant difference would make the statement of witnesses unbelievable.

25. This Court in State of U.P. Vs. Babu and others 2007(9)ADJ, 107 (DB) has observed that it is not every word and sentence of different prosecution witnesses which would render their statement to be brushed aside but the duty of Court is to find out the truth and do justice after going through the evidence in its entirety. In paragraphs no. 31, 32 and 33 of the judgment, the Court said:

"31. No doubt, in long run examination of witnesses that too after long interval from the date of incident, some discrepancies are likely to occur in such deposition. But in such matters, the duty of the Court is to find out the truth and do justice accordingly. The evidence of the prosecution witnesses can neither be brushed aside on mere existence of some discrepancies or on the ground of other factors, namely, relationship, lack of independent witnesses etc. but the entire evidence has to be considered, appreciated and adjudged in wholesome manner. The duty of the Court of law is heavy in the sense that it should ensure that no innocent should be punished but simultaneously it is also under an obligation to see that no guilty person should escape from the clutches of law by taking advantage of so-called technicalities as this will not only lead to further serious threats to the entire society but may also shake the confidence of public at large in the system of dispensation of justice. Our experience has shown that exonerating a guilty person due to any reason whatsoever has caused more damage to the society since it

has multiplied the occurrence of crime as well as has also produced more criminals attracting them to commit crime since easy acquittal has resulted in encouraging them to break law with impunity. It will be useful to remind with the words of caution as observed by the Hon'ble Apex Court (Krishna Ayer J.) in *Shiva Ji Sahabrao Bobade* (supra) emphasizing to keep balance between the individual liberty and evil of acquitting guilty persons. The Court observed that we should remind ourselves of necessary social perspective in criminal cases which suffers from insufficient forensic appreciation. The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand special emphasis in the contemporary context of escalating crime and escape. The Courts having duty of judicial review owe the public accountability of such system. The golden thread of proof beyond reasonable doubt should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community. The evil of acquitting a guilty person light-heartedly goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumption against indicted persons and more severe punishment of those who are found guilty. Too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. Miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of innocent.

32. What was observed and apprehended about 30 years back is to be reiterated having been proved by the time and fact that law and order in society is on continuous deterioration and law enforcing machinery is finding itself in great difficulty to control. On the contrary, time and again the instances are being highlighted where despite broad daylight crimes the accused are being acquitted and wandering fearlessly in the society with greater boldness. The fear of legal proceedings has vanished.

33. Therefore, in a case of the kind which is in hand, the evidence has to be assessed and considered in the light of the facts which are not disputed by the parties and also to find out the evidence which is duly corroborated and once such evidence in respect to certain facts is there, the same should not be ignored merely due to existence of some discrepancies in the statements of the prosecution witnesses or other reasons unless the duly corroborated evidence is found to be wholly unreliable." (Emphasis added)

26. In the present case the most important and also independent witness of fact is Court Amin PW 4 Sri Bal Kishan who has supported prosecution story substantially and on all material aspects. There is virtually no material inconsistency. It is well conceivable that when three persons witness an incident, their behaviour, reaction and memorisation of incident as well as other things in the vicinity would be different. In *Bachittar Singh vs. State of Punjab* (2002) 8 SCC 125, the Apex Court commenting upon the human behaviour said that it varies from man to man. Different people behave and react differently in different situations. Human behaviour depends upon the facts and circumstances of each case. How a man would behave in a particular situation, can never be predicted.

27. Applying the above observations to the present case, it would not be fair to suggest that after a few years, when the witnesses were deposing their statements, they were expected to tell exact topography of the site and other details minutely with which they were not much concerned at the time of incident since the prime objective at that time was to end the scuffle and save persons who were being assaulted or attacked. In this context, if someone or others have been able to tell about other facts relating to site, it is quite sufficient particularly if there is no confusion regarding identity of site of the incident. So far as this aspect is concerned, almost the prosecution story is consistent, duly supported with the witnesses of fact that the incident took place in the field of Fakira when Omkar Prasad had gone to take possession of land purchased in auction and was accompanied by the officials of Civil Court namely, Court Amin and peon besides Rajnish Kumar, companion of Omkar Prasad who also sustained injuries.

28. Learned counsel for the appellants could not point out any material irregularity or inaccuracy or inconsistency, what to say of error in the judgement of Trial Court, holding the appellants guilty. I have also gone through the entire judgement very carefully and find that learned Trial Court has very carefully considered the entire evidence on record. After proper assessment and appraisal of evidence he has recorded conviction holding the accused appellants guilty.

29. I find no reason to interfere with the aforesaid judgment.

30. So far as quantum of punishment is concerned, no argument has been raised by learned counsel for the appellants on this aspect but I myself have considered the entire case on this aspect and find that in the facts and circumstances of the case, the punishment imposed on the appellants cannot be said to be unreasonable, unjust or excessive

31. In the end, I do not find merit in the appeals. Both the appeals are hereby dismissed. The judgment and order of Trial Court is hereby affirmed.

32. The accused appellants Rajvir and Sheoraj are on bail. Their bail bonds and surety bonds are cancelled. The C.J.M. Bulandshahr shall cause them to be arrested and lodged in jail to serve out the sentences passed against them. The compliance shall be reported within two months.

33. Certify this judgment to the lower court immediately.

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