

Vishwanath and ors. Vs. State of U.P.

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Court : Allahabad

Decided On : Apr-15-1991

Reported in : 1991CriLJ3076

Judge : Palok Basu and ;P.P. Gupta, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 302, 467 and 468

Appeal No. : Criminal Appeals Nos. 2064, 2072 and 2116 of 1977

Appellant : Vishwanath and ors.

Respondent : State of U.P.

Advocate for Def. : Dy. Govt. Adv.

Advocate for Pet/Ap. : T.N. Pandey, Adv.

Disposition : Appeal dismissed

Judgement :

P.P. Gupta, J.

1. These are three connected criminal appeals filed by Vishwanath (Criminal Appeal No. 2116 of 1977), Chotey Lal (Criminal Appeal No. 2064 of 1977) and Dase alias Ram Das (Criminal Appeal No. 2072 of 1977) against the judgment and order dated 10-9-1977 passed by the II Addl. Sessions Judge, Basti, in S.T. No.

265 of 1976, convicting and sentencing the appellant, Vishwanath, Under Section 302, IPC and the other two appellants, viz. Chotey Lal and Dase alias Ram Das, Under Section 302 read with Section 34, IPC and sentencing each of them to imprisonment for life.

2. The charge against the appellants is that they on 10-3-1976, at about 4-15 p.m. in village Gegaria Garh, P. S. Dhanghata, within the district of Basti, in furtherance of their common intention, committed the murder of Kishun resident of village Gagaria Garh.

3. The prosecution case, in brief, is that the deceased Kishun was resident of village Banda and was issueless. His brother, Khuddar's family was living there with him. Ram Daur was the son of Khuddar and Jamuna was the grand son. Since Kishun was issue-less, he had executed a 'will' in favour of Ram Daur on 11-6-1976 (Ex. Kha-5). There was a litigation between Bansraj, a resident of the same village Gagaria Garh, and the appellant, Dase alias Ram Das. This litigation related to the enforcement of a contract allegedly entered into between Dase and Bansraj. A proceeding of forgery against Ram Das was pending in the court of Judicial Magistrate. Bansraj died during the proceeding and the deceased Kishun, being a relation of Bansraj, took up the pairvi of that case, which created a bad blood between Ram Das alias Dase and the deceased Kishun. The other two appellants, viz. Vishwanath and Chotey Lal, who are father and son, were also inimical to Kishun. This enmity of Ram das and Chotey Lal with Kishun was said to be a motive for the murder of Kishun.

4. On the day of incident, i.e. on 10-3-1976, at about 4-15 p.m., the aforesaid three accused were sitting on a culvert situate towards west of the main road. The deceased Kishun had gone to market along with his grand son, Jamuna. While Jamuna (P.W. 2) and the deceased Kishun were returning towards their house, after attending the market, they reached near the culvert where all the three appellants were sitting. Chotey Lal and Ram Das accosted Vishwanath to do away with Kishun, whereupon Vishwanath fired at Kishun with a country made pistol which hit him on his back. The assailants ran away in the east and could not be apprehended. The incident was seen by Sakhavat (P.W. 1) and Ram Hit (P.W. 3),

who were accompanying Kishun and Jamuna from the market. When these persons approached towards Kishun, he was found dead. His dead body was taken to the Police Station where Jamuna lodged an oral FIR at 5-15 p.m., which is Ex. Ka-1.

5. The investigation of the case was taken up by the S.O., Dhananjai Singh, who prepared the Panchnama, Ex. Ka-3, of the dead body of Kishun. Other necessary formalities were also completed. The dead body of Kishun was sent for post-mortem. The postmortem on the dead body was performed on 11-3-1976 at 3-30 p.m. by P.W. 5, Dr. S.C. Chaturvedi, and the following ante mortem injuries were found on the dead body :--

1. Gun shot wound 2.5 cm x 2.2 cm x thoracic cavity deep in the nostril on the back 12.5 cm from lower angle of both scapular and 15 cm below the 7th circle spine. The margins of the wound had lacerated and everted. No tattooing or charring scar around the wound (wound of entry) wound directed wards all and upwards.

2. Gun shot wound 0.5 cm x 0.5 cm x 4 cm on the body 0.5 cm above injury No. 1 margins everted. No tattooing or charring.

3. Gun shot wound 0.5 cm x 0.5 cm contusion with injury No. 11 cm to the left of injury No. 1. Margins inverted. No tattooing or charring scar.

4. Gun shot wound 0.5 cm x 0.5 cm x left side chest cavity deep 1.5 cm to the left of injury No. 1 and 1 cm above injury No. 3. Margins inverted. No tattooing and charring.'

Third and fourth ribs of left side were found fractured. In the opinion of the Doctor, the death was due to shock and haemorrhage due to ante mortem injuries. The Doctor further opined that the deceased was fired upon from a distance of 1-2 feet. He denied that two shots were fired at the deceased Kishun.

6. The prosecution examined four witnesses of fact, viz. P.W. 1, Shakhavat, P.W. 2, Jamuna, P.W.3, Ram Hit, and P.W.4, Dulare, besides Dr. S.C. Chaturvedi, who performed the post-mortem, and S. O., Dhananjai Singh, who investigated the

case.

7. On an assessment of the entire evidence on record, the learned Additional Sessions Judge found the charges against all the three appellants fully proved and he convicted and sentenced the appellants, as above.

8. Feeling aggrieved, all the three appellants have filed separate appeals.

9. The learned counsel for the appellants, Sri O. P. Misra, and the learned counsel for the informant, Sri G. C. Dwivedi as also the learned Additional Government Advocate, Sri R. C. Deepak, were heard at length and the entire record of the case was also perused.

10. The prosecution story is unfolded by P.W. 1, Sakhavat, who is a resident of Banda Bazar, P. S. Dhanghata. He has been corroborated by P.W. 2, Jamuna, and P.W. 3, Ram Hit, of the same village. None of the two witnesses, viz. P.W. 1, Sakhavat, and P.W. 3, Ram Hit, are related to the deceased Kishun. P.W. 2, Jamuna, is the grand son of deceased Kishun. All of them have stated that while they were returning from the village market at Gagaria Garh Chauraha Bazar when this incident took place near the culvert, where all the three appellants were sitting from before. According to their version, on seeing Kishun, the appellants, Chotey Lal and Dase alias Ram Das accosted Vishwanath to do away with Kishun, whereupon the appellant, Vishwanath, whipped out a country made pistol and fired at the back of Kishun, who fell down dead. The occurrence took place in broad day light at about 4-15 p.m. There was sufficient light at that time and, therefore, all the witnesses have had full opportunity to identify the assailants, who were also known to them from before.

11. The testimony of the eye-witnesses is corroborated from the medical evidence also. On post-mortem examination of the dead body of Kishun, four gun shot wounds were found on the back of deceased Kishun. The ocular version of the witnesses, who have unanimously stated that the shot fired at Kishun by Vishwanath hit him on his back. Their statements find further corroboration from the findings of Dr. S. C. Chaturvedi (P.W. 5), who performed the autopsy on the dead body of Kishun. The above named witnesses have said that the shot at

Kishun was fired from at a distance of about 8-10 feet. Dr. Chaturvedi did not find any charring, blackening or tattooing around any of the four wounds found on the dead body of Kishun. Thus the ocular version of the witnesses that the deceased was fired at from about a distance of 8-10 feet finds ample corroboration from the medical evidence. There is, therefore, no reason to disbelieve the versions given by the eye-witnesses.

12. It was pointed out by the learned counsel for the accused-appellants that Dr. Chaturvedi has stated in his cross-examination that the shot in question might have been fired from a distance of about 1 1/2-2 feet. It was, therefore, submitted that because of this close proximity of the fire arm from the body of Kishun, charring, blackening and tattooing must have been present around the wounds. Since it was not there, the witnesses examined by the prosecution cannot be believed.

13. Dr. Chaturvedi, who gave the above opinion is not a ballistic expert. His statement is not corroborated either by his findings or by the ocular version, as given by the witnesses. On the contrary, the eye-witnesses account finds corroboration from the findings of the medical expert. It may be recalled that the witnesses have stated that the deceased was fired at from a distance of about 8-10 feet, which finds place due to corroboration from the findings of the Doctor. As has been stated above, the Doctor did not find any blackening, charring or tattooing around any of the wounds, which duly corroborates the ocular version. In these circumstances the opinion of the Doctor that the distance of weapon from the body of deceased Kishun, at the time of firing the fateful shot, would have been 1 1/2-2 feet cannot be said to be correct, as it is not an opinion of a ballistic expert and does not find corroboration from any other evidence or material on record.

14. It was next submitted before us, on behalf of the appellants, that it cannot be believed that all the witnesses were returning together from the market. It has not been challenged that the weekly village market at Gagaria Garh Chauraha Bazar was held that day. It is a common knowledge that the residents of nearby villages attend these weekly markets to make purchases of their weekly requirements.

Sometimes the residents of nearby villages used to go to these weekly markets just to pass time. There is, therefore, no reason to disbelieve the statements of P.W. 1, Sakhayat, and P.W. 3, Ram Hit, that on the day of incident they had gone to the village market. P.W. 2, Jamuna, who is grand son of deceased Kishun, has also stated that he had gone there along with his grand father and was returning with him. There is nothing unnatural in their statements. The fact that the return from the Bazar together does not also cast any doubt on their credibility. Residents of same village, when meet at the weekly market, sometimes join and return together. On this account alone, their testimony cannot be discarded.

15. It was next submitted before us that P.W. 1, Sakhavat, is a partisan witness, inasmuch as he was a witness to the 'will' executed by the deceased, Kishun. P.W. 1, Sakhavat, has been fair enough to admit this fact. In our opinion, this circumstance alone cannot be a circumstance to disbelieve him, if the credibility of his testimony does not suffer from any infirmity. From a perusal of his statement it cannot be said that anything has been brought out from his statement as would discredit his evidentiary value. P.W. 3, Ram Hit, is an independent witness. The statements of these two eye-witnesses have been duly corroborated by the medical evidence. They had absolutely no reason to speak falsely against the appellants. In the circumstances, we find that their unshaken testimony must be believed.

16. The prosecution has also successfully established that the accused had a motive to do away with Kishun. P.W. 2, Jamuna, who is grand son of deceased Kishun, has stated that there was one Bansraj Kurmi whose wife was Smt. Chahdra. The appellants, Chotey Lal and Vishwanath, had acquired the property of Bansraj under forged sale deed. Similarly, the appellant, Dase had also got a fictitious sale deed executed in his favour purporting to have been executed by Bansraj. Bansraj had filed a complaint. During pendency of that complaint, Bansraj died. After his death deceased Kishun used to do pairvi in the case because Smt. Chandra was a widow and Bansraj was survived with a minor son. This had created bad blood and enmity between the accused persons and Kishun had moved an application (Ex. Ka-5) for being appointed as guardian of Shiva Pujan, the minor son of Bansraj, in a case of Ram Das alias Dase v. Shiva Pujan and

Ors. This application was moved on 13-12-1975. The copy of the complaint filed by Kishun against Ram Das alias Dase Under Sections 467 and 468, I.P.C. on 26-9-1975 is Ex. Ka-16. Ex. Ka-17 is a copy of the application moved by Kishun for permission to prosecute on behalf of Bansraj. In the application, Ex. Ka-16, Kishun had described himself to be the Phupha of Bansraj deceased. Since the property of Bansraj was allegedly taken by the accused persons under forged sale deeds, Kishun was determined to oust these persons from the property of Bansraj. The accused persons had, therefore, sufficient motive to do away with Kishun. As Smt. Chandra being the widow of Bansraj and Shiva Pujan being the minor son of Bansraj and, therefore, they could not look after the litigation and safeguard the property of Bansraj, the accused persons considered Kishun as the only obstacle in their way. It is, therefore, believable that the accused persons had sufficient motive to commit the murder of deceased Kishun.

17. From the evidence already discussed above, it is duly proved that the appellant, Vishwanath, who had a motive also to do away with Kishun, fired at Kishun hitting him on his back. The death of Kishun was caused due to shock and haemorrhage on account of gun shot injuries, which was sufficient in the ordinary course to cause his death. He had the intention to commit the murder of Kishun. Consequently, it must be held that the prosecution has succeeded in proving the offence of murder Under Section 302, IPC against the appellant, Vishwanath.

18. The next question that arises is whether or not the remaining two appellants, viz. Chotey Lal and Dase alias Ram Das, were present and accosted Vishwanath to do away with Kishun. We find that there are contradictions in the FIR and the statements of witnesses on this point. The averment in the FIR is that 'Chotey Lal Wah Dase Lalkarke Kahle Ki Aab Ka Dekhat Wate Mar De'. This statement has been attributed to both the appellants, viz. Chotey Lal and Dase. It cannot be believed that both of them must have accosted simultaneously using the same language. P.W. 1, Sakhavat, has stated that on seeing Kishun Lal coming, Chotey Lal and Ram Das surrounded him (Kishun) from the front and accosted Vishwanath that 'Aap Keya Dekhat Ho Daag Do'. P.W. 2, Jamuna, has mentioned this alleged accosting in the following words: 'Aap Keya Dekh Rahe Ho Maar Do.'

P.W. 3, Ram Hit, has stated that the appellants, Chotey Lal and Dase, said to Vishwanath 'Maar Do'. Thus we find that the statements of these witnesses on this point are not in conformity with the FIR and their statements are also not in consonance with each other. Another notable factor is as to why was this accosting necessary? If Vishwanath had pre-planned to kill Kishun, the alleged inciting words were wholly unnecessary as he would have executed his plan even without the said incitement. Moreover, as has been said above, it is difficult to believe that both of them should have accosted simultaneously and that too in the same words. It, therefore, becomes doubtful whether Chotey Lal and Dase shared the common intention with Vishwanath by accosting him to do away with Kishun. In the circumstances, by way of abundant caution, we think that these two appellants should be given the benefit of doubt.

19. Chotey Lal and Dase alias Ram Das, appellants are held not guilty of the offence Under Section 302/34, I.P.C. The appeals of Chotey Lal and Dase alias Ram Das are allowed and their conviction and sentence are set aside. They are on bail. They need not surrender.

20. The appeal of Vishwanath is dismissed. He is on bail. His bail bonds are cancelled. He will surrender to his bail bonds to serve out the sentence awarded.