

Rakesh S/O Mohan and ors. Vs. State

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Court : Allahabad

Decided On : Mar-04-2004

Reported in : 2004CriLJ3540

Judge : M.C. Jain and ;K.N. Ojha, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34 and 300; [Evidence Act, 1872](#) - Sections 3

Appeal No. : Crl. Appeal No. 1325 of 1980

Appellant : Rakesh S/O Mohan and ors.

Respondent : State

Advocate for Def. : R.S. Maurya, A.G.A.

Advocate for Pet/Ap. : M.B. Lal, ;Satish Trivedi, ;A.K. Srivastava, ;Imranullah, ;G.S. Chaturvedi and ;P.K. Srivastava, Advs.

Judgement :

M.C. Jain, J.

1. Four appellants, namely, Rakesh, Ram Babu, Rajendra Kumar alias Rajjan and Basant preferred this appeal against judgment and order dated 6-6-1980 passed by Sri D.K. Trivedi, the then VII Additional Sessions Judge, Kanpur in Sessions

Trial No. 64 of 1979. Each, of them has been convicted under Section 302 I.P.C. read with Section 34 I.P.C. and sentenced to life imprisonment. It was one Prem Kumar alias Chillu who was murdered in this incident which occurred on 24-11-1977 at about 7.15 p.m. in Ahata Sawai Singh situated in Pheelkhana, District Kanpur Nagar. The distance of the police station from the place of occurrence was only 4 Furlongs and the report had been lodged by Manoj Kumar Dixit P.W. 3 (nephew of the deceased), not an eye-witness.

2. This appeal earlier came up for hearing, but none turned up from the side of the appellants even at the revision of the list, though they were represented on record by certain lawyers. This Bench, therefore, heard learned A. G. A. on behalf of respondent-State and after going through the record the appeal was decided on merits on 31-1-2003. The appeal was dismissed.

3. The appellants Rakesh, Rajendra Kumar alias Rajjan and Basant went in appeal before Apex Court. By order dated 9-10-2003, the Apex Court remanded the appeal for being decided after hearing the arguments of the counsel for the appellants. The relevant part of the Order of the Apex Court reads as under :--

'.....Criminal appeal shall be restored to the file of the High Court. The parties are directed to appear before the High Court on 10th November, 2003 on which date the Criminal Appeal must be listed on the board of the concerned Court. The High Court may hear the matter on that date or any other date convenient to it. If the appellants' counsel does not appear on 10th November, 2003 or on any other day on which the High Court fixes for hearing, the High Court may then proceed ex-parte. Otherwise, the High Court to hear the appellants before disposing of the matter on merits.

The appeal stands disposed of accordingly.'

4. It is in this way that the appeal has come up for hearing again before this Bench. A report has been received from C.M.M. Kanpur Nagar that the original appellant No. 2 Ram Babu has died. The appeal, therefore, abated under our order dated 15-12-2003 as regards the original appellant No. 2 Ram Babu. Presently the Court is concerned with the remaining three appellants, namely,

Rakesh, Rajendra Kumar alias Rajjan and Basant.

5. From the side of the appellant Rakesh, arguments have been advanced by Sri Satish Trivedi, learned Senior Advocate. Sri G. S. Chaturvedi, learned senior Advocate has submitted arguments on behalf of the remaining two accused-appellants. Sri R. S. Maurya, learned A. G. A. has been heard from the side of State. The record of the lower Court is before us which we have carefully perused.

6. The victim of the offence was Prem Kumar alias Chillu who had been done to death by stabbing. The case of the prosecution may be summarised thus : The victim was caught hold of by the accused Ram Babu and Rakesh and he was stabbed by the other two accused Rajendra Kumar alias Rajjan and Basant on the stairs leading to the chabutra of the house of one Triloki Babu situated in Ahata Sawai Singh. The incident was witnessed by Shyam Sunder PW 5, Prem Shankar PW 6 and few others. On being informed by someone, Manoj Kumar Dixit PW 3 reached the place of the incident and found his uncle Prem Kumar alias Chillu lying in a pool of blood in an injured and unconscious condition. Manoj Kumar Dixit PW 3 took his uncle Prem Kumar alias Chillu to the U.H.M. Hospital, Kanpur where he was declared brought dead. He then lodged the F.I.R. at 9.30 p.m. the said night. The names of the accused or the witnesses were not mentioned in the F.I.R. and the same came to light during investigation which also revealed enmity between the accused and the deceased named above.

7. The post-mortem over the dead body of the deceased was conducted by Dr. B.D. Ravi PW 1 on 25-11-1977 at 3 p.m. The deceased was aged about 28 years and 2/4 days had passed since he died. The following ante-mortem injuries were found on his person :

1. Abrasion 2.5 cm x 3/4 cm on outer half of right clevis.

2. Abrasion 3 cm x 1.5 cm on right deltoid.

3. Incised wound 3.5 cm x 1/3 cm x subcutaneous tissue deep on left chest 10 cm below arm-pit.

4. Seven linear abrasions in an area of 13 cm x 11 cm on left side abdomen, 1 cm to 5 cm in length in lumbar region.
5. Incised wound 3 cm x 3/4 cm x subcutaneous tissue deep, 4.5 cm above the left anterior superior iliac spine.
6. Stab wound 4 cm x 1 cm x peritoneal cavity deep on tip of right ninth costal cartilage.
7. Stab wound 5 cm x 2 cm x peritoneal cavity deep on left suprapubic region.
8. Incised wound 1 cm x 3 cm x subcutaneous tissue deep on the front of right, thumb.
9. Incised wound 1.5 cm x 4 cm x muscle deep on right thenar eminence.
10. Incised wound 1.4 cm x .4 cm x muscle deep on front of middle digit of left index finger.
11. Incised wound 1.6 cm x .5 cm x muscle deep just below left middle finger.
12. Incised wound 1.4 cm x .3 cm x muscle deep on front of first digit of left middle finger.
13. Incised wound 3.5 cm x 1 cm x bone deep on the back at the level of 8th thoracic vertebra slightly to the right from the midline.
14. Three abrasions linear 2 cm x 9.5 cm on back of left arm.

8. The abdominal walls, small intestine and liver were found cut. Injuries No. 1, 2, 4 and 14 could have been caused on a fall while others could be caused by knife. According to the Doctor, the cause of death was shock and haemorrhage as a result of the injuries sustained by the deceased which were sufficient in ordinary course of nature to cause death and it might have taken place between 7.30 and 8 p.m. on 24-11-1977.

9. The prosecution, in all, examined seven witnesses including Doctor and Investigating Officer. The eye-witnesses were Shyam Sundar PW 5 and Prem

Shankar PW 6 while Manoj Kumar PW 3 was the informant of the case. Gopal Dixit PW 4 was the brother of the deceased. The evidence adduced by the prosecution found favour with the learned trial judge who recorded the impugned judgment.

10. The accused denied the allegations of the prosecution and also their complicity in the crime. Their contention was that they had been falsely implicated due to party factions and police enmity. Jageshwar Dayal 'Nashtar' DW 1, Raj Kumar Trivedi DW and Dinesh Singh, Constable DW 3 were examined in defence by them.

11. We take up the case of appellant Rakesh first. As is clear from the above, the role assigned to him was of catching hold of the victim while other two present appellants allegedly stabbed him. One Ram Babu (who was also appellant and has died) had also allegedly caught hold of the victim. One of the arguments of Sri Satish Trivedi on behalf of appellant Rakesh is that he would not have risked his own life by holding the victim with another when he (victim) was allegedly stabbed by two others. Our attention has been invited to the post mortem report of the deceased which shows that he had received in all 10 incised or stabbed wounds on different parts of his body, meaning thereby that a number of blows had been inflicted on him. The argument of Sri Trivedi has substantive force and cannot be brushed aside lightly. Indeed, the instinct of preservation is strongest in all living beings. On being repeatedly stabbed, the object (victim) could and would not have remained still or stationary. He would necessarily have moved from one side to the other to save the attack. In this scenario, the possibility was very much there of the captor himself receiving injury. Further, when two persons are readily armed with knives to inflict blows, it is hardly needed that some one else should catch hold of the victim to accomplish the job. So judged, an element of doubt persists insofar as the appellant Rakesh is concerned to whom the role of catching hold of the victim has been assigned. He, therefore, deserves to be afforded the benefit of doubt.

12. We now take up the case of the other two appellants Rajendra Kumar alias Rajjan and Basant who allegedly stabbed the deceased. Much emphasis has been

laid from the side of these appellants on this aspect of the matter that none was named in the F.I.R. It has to be pointed out that the incident occurred on 24-11-1977 at about 7.30 p.m. and the report was lodged the same night at 9.30 P.M. by Manoj Kumar Dixit PW 3 who was not an eye-witness. True, the names of the assailants and the witnesses are not there in the F.I.R. but it is not at all fatal to the prosecution because there is a valid reason for it. The informant had hurried to the spot on being informed by some one that his uncle was lying injured there. He had found him in a pool of blood in injured and unconscious condition. Naturally, his first anxiety was to remove him to hospital to save his life, if possible. He first took him to the hospital where he was declared dead. Thereafter he lodged a written F.I.R. at 9.30 p.m. the same night. The victim was alive when he reached the spot. He was not expected to waste time there to enquire from the persons around as to who were the assailants and who had seen the actual incident. Rather, non-mentioning of the names of the assailants and the witnesses in the F.I.R. speaks about its genuineness and spontaneity that it had been lodged without any deliberation or concoction. The names of the assailants and the witnesses having figured after lodging of the F.I.R., the same could not possibly be mentioned in the F.I.R. So, the two appellants do not gain any point by complaining non-mentioning of their names and of witnesses in the F.I.R.

13. It has next been criticized that according to the prosecution, the incident occurred on the stairs leading to the Chabutara of the house of one Triloki Babu situated in the Ahata of Sawai Singh, but he was not produced as a witness. Our attention has been drawn to the testimony of eye-witness Shyam Sunder PW 5 who admitted that neither Triloki Babu nor any other member of his family reached the spot. It is also in his statement that windows of his house were open at that time and tubelight was emanating therefrom reaching the spot.

14. It is common knowledge that generally the people keep themselves away from Court proceedings unless it is inevitable. Having regard to the general apathy and indifference of the public relating to crimes, there is nothing surprising that none from the house of Triloki Babu came out at the time of the incident. We are, therefore, not inclined to attach any importance to this argument raised from the side of the appellants.

15. The third argument from the side of the appellants is that Manoj Kumar PW 3, nephew of the deceased, simply a lad, was asked to inform the police by the family members of the deceased, though it has been admitted by him that his father and uncle had also reached the hospital where he had written the F.I.R. It has been pointed out that this Manoj Kumar was aged about 18 years when his testimony was recorded in the Court on 10-1-1980 and the incident having occurred on 24-11-1977, he would have been a little over 16 years at the time of the incident.

16. We should say that there is no particular requirement of law as to who can lodge the F. I. R. A boy aged about 16 years who incidentally happened to belong to the family of the victim could very well lodge the F. I. R. and it cannot be made a subject of criticism that: other elders of the family didnot prefer to do so. The purpose of lodging the F. I. R. is to activate the police for investigation and booking the culprit for trial. It is, therefore, not possible to attach importance to this argument that the F. I. R. was lodged by a boy who was a little over 16 years at the time of the incident.

17. The fourth argument of the learned counsel for the appellants is that the statement of Gopal Dixit PW 4 (brother of the deceased) is not consistent as to when did he come to know the names of the assailants and the witnesses. His statement is that when he again visited the hospital after the lodging of the F. I. R., then he came to know of the names of the assailants and witnesses. In para No. 17 of his statement, he stated that in the night of the incident, he came to know at about 9.45 or 10 p.m. through rumours about the names of the assailants. The statement of the Investigating Officer, Veg Raj Singh PW 7 has also been referred to which is to the effect the said Gopal Dixit PW 4 disclosed to him (Investigating Officer) that he had come to know about the names of the assailants on the day following the night of the incident. We do not think that it is of any significance whether Gopal Dixit, PW 4 had come to know the names of the assailants in the night itself or the following day. The point of the matter is that he is not an eye-witness and it was after lodging of the F. I. R. that he came to know of the names of the assailants and the witnesses which he disclosed to the Investigating Officer. It is the testimony of the eye-witnesses, on the scrutiny of which the face of the

case turns.

18. The next argument of the learned counsel for the appellants is wholesome criticism of the testimony of two witnesses Shyam Sunder PW 5 and Prem Shanker PW 6. It has been urged that they are got up witnesses and they were not at all present at the spot. It has been urged that Shyam Sunder PW 5 admitted in his cross-examination that the shop of Mangali Halwai where he had gone to purchase sweets was at a distance of 1/2 furlong from his house whereas at a distance of 150-200 paces, there was the shop of deshi ghee sweets of Agrawala. He also admitted that there was no particular reason for his having gone to Mangali Halwai to purchase sweets. It was urged that he would have gone to purchase sweets from the nearer shop of Agrawala instead of covering more distance to reach the shop of Mangali Halwai. We do not think that the testimony of this witness should be discarded merely because he preferred to go to the shop of Mangali Halwai to purchase sweets. It does not render his presence at the spot doubtful. There is nothing wrong if a customer prefers a particular shop for purchasing sweets. Half a furlong means 110 yards and there would not be much difference between 110 yards and 150-200 paces. A commoner is not expected to measure the distance by inch-tape to take a logical decision in making purchases only from a shop which is a little nearer to his house.

19. Shyam Sunder PW 5 gave plausible explanation about his presence at the spot that he was going to the shop of Mangali to purchase sweets. When he reached the Ahata of Sawai Singh School, he heard noise from the side of the house of Triloki Babu. Looking to that side, he saw Chillu crying at the staircase leading to the Chabutara of house of Triloki Babu. The core of his testimony could not be shaken that he had seen the appellants Rajendra Kumar alias Rajjan and Basant stabbing him. He was emphatic that he saw the incident in the light of bulb and also in the light emanating from the fluorescent tube of the house of Triloki Babu.

20. It has been pointed out that in his examination-in-chief, he stated that Ram Babu and Rakesh caught hold of the victim whereas Rajendra Kumar alias Rajjan and Ram Babu stabbed the deceased. He so stated in his examination-in-chief on

10-1-1980. On being recalled, he corrected himself on 14-3-1980 by saying that Ram Babu and Rakesh had caught hold of the victim whereas Rajendra Kumar alias Rajjan and Basant were stabbing him. No capital can be made out of it. It was obviously a slip of tongue that on 10-1-1980 he happened to name Ram Babu as the person catching hold the victim as well as stabbing him. The consistent case of the prosecution right from the stage of investigation was that Ram Babu and Rakesh had caught hold of the victim whereas Rajendra Kumar alias Rajjan and Basant had stabbed him. To err is human. The witness corrected his mistake of slip of tongue when recalled. Therefore, as per his testimony, the main assailants who stabbed the victim were Rajendra Kumar alias Rajjan and Basant.

21. He belonged to the same locality and had every occasion to be present at the place of incident as explained by him. He categorically denied that he was in any party. He was not an interested person and it is not unusual that he did not go to the Police Station to inform the police or family members of the deceased. He was going to purchase sweets. He went to make said purchase and came back. It was not expected of him, a disinterested person, to have gone to the police when he was not the only person to be present at the place of the incident. He had no axe to grind against the accused. Nor he had any concern with the deceased.

22. Rather, the accused attempted to create indirect pressure on Shyam Sunder PW 5. It is there in the testimony of Shyam Sunder PW 5 that proceedings under Sections 107/116, Cr. P. C. had been initiated against him after the incident at the instance of the accused.

23. There is nothing to discredit the testimony of Prem Shanker PW 6 against the appellants who are real assailants of the deceased. He explained that he was going to his house from Parade market to his house when he saw the incident in the light of bulb and tubelight emanating from the window of Triloki Babu. At that time, he was returning home with load of cloth which he used to sell. He had a house in Chawal Mandi also where he used to keep his cloth for selling in different markets. He usually operated business in the markets of Babu Purwa and Parade. On being interrogated, he made a statement to the Investigating Officer. He could not be deemed to be a chance witness. It was explained by him that due to fear,

he could not proceed further and placed his load in the Gali.

24. As against Prem Shanker PW 6, the argument is that as is in his statement, he used to sell cloths in the markets of Babu Purwa and Parade as also in Bakerganj. It was pointed out that the day of the incident 24-11-1977 was a Thursday and the witness had admitted that weekly market in Bakerganj used to be held on Wednesday and Friday. The statement of the witness was also to the effect that when he used to go for selling cloths in Bakerganj market, he used to keep his goods in his house at Kidwai Nagar. It was urged that in this view of the matter, the reason given by him for his presence at the spot was wrong and he could not be present at the spot at all.

25. In our opinion, it would tantamount to straining his statement beyond permissible limits that he had no occasion to be present there for the reason of keeping his goods in his house of Chawal Mandi. What he actually stated was that usually he used to operate in markets of Babu Purwa and Parade but casually and occasionally used to sell cloths in the market of Bakerganj also. Therefore, it was immaterial that the market of Bakerganj was due to be held on the next day (Friday). The argument built up from the side of the appellants in this behalf to displace the testimony of Prem Shanker PW 6 has no merit.

26. For him, it has also been urged that he did not disclose the names of the assailants at the spot, though his version is that Manoj Kumar PW 3 had reached there in his presence and he had even helped him to put the victim in the rickshaw for being taken to the hospital.

27. It would be recalled that the victim was alive by then. Immediately after the incident, a crowd had collected at the spot. The attention of Manoj Kumar PW 3 was focussed and completely engaged in taking the victim to the hospital to save his life, if possible. The statement of the witness is also to the effect that he was in a state of shock and terror after witnessing the incident. He also stated that the accused were bad characters and, therefore, he did not go to the Police Station. This witness went to his house in Chawal Mandi and stayed there in the night. His testimony delivered before the court tested by cross-examination cannot be thrown overboard merely on the ground that he did not disclose the name of the

assailants at the spot to Manoj Dixit (nephew of the deceased) who was in a hurry to carry him to the hospital to save his life. Nothing adverse can be interpreted against this witness if in a terror ridden situation he did not instantly disclose to him (nephew of the deceased) the names of the assailants and that he had witnessed the incident. At the end of his cross-examination, the learned Sessions Judge has recorded his observation to the following effects -- 'witness appears to be under tension which is quite apparent from his facial expression and general demeanour and appearance.' It is not surprising that immediately after the incident also, he became tense, terror stricken and dumb founded momentarily.

28. Prem Shanker PW 6 disclosed his presence at the spot on being interrogated by the Investigating Officer. It was Gopal Dixit PW 4 who had informed the names of the assailants to the Investigating Officer as rumoured in the locality and the Investigating Officer came to locate and interrogate this witness. About Prem Shanker PW 6 also the appellants could not show that either he was friendly with the deceased or his family members.

29. Yet another argument from the side of the appellants is that it has come on record that the deceased was involved in a number of criminal cases and as such by any of his enemies, he could have been killed. Even Prem Shanker PW 6 admitted that he was a bad character and a terror in the area. So far as the statement of Prem Shanker PW 6 is concerned, he so stated about the accused persons also. Any way, the criminal antecedents of the deceased did not mean that he had lost the right of his life. There is no justification to jump to this conclusion either that he was killed by someone else. In our opinion, the so-called unsavoury antecedents of the victim cannot earn benefit of doubt in favour of the accused-appellants, who are proved to be his actual assailants, stabbing him, ultimately resulting in his death.

30. On careful consideration, we are of the opinion that Shyam Sunder PW 5 and Prem Shanker PW 6 were independent witnesses who plausibly explained their presence at the spot. They had no axe to grind against accused-appellants and their testimony had the right of truth proving beyond doubt that two appellants, namely, Rajendra Kumar alias Rajjan and Basant were the real assailants who

stabbed the victim. They were neither shown to be thick with the deceased or his family nor inimical to the accused-appellants. Their testimony was not at all tainted.

31. To conclude, it was amply proved by the testimony of these two witnesses that the real assailants were the present two accused-appellants-Rajendra Kumar alias Rajjan and Basant who committed this murder by preplanning and premeditation. They were acting in concert sharing common intention of one another. As many as 14 injuries were caused on the person of the deceased. Out of them, ten were in the form of incised wounds and they, therefore, committed offence punishable under Section 302, I. P. C. read with Section 34, I. P. C.

32. At this stage, a little discussion is required to clear the mist as to how the testimony of the witnesses is capable of acceptance as against these two accused-appellants while benefit of doubt is being afforded to the third one, namely, Rakesh to whom the role of catching hold of the victim was assigned. It must be observed that the maxim 'falsus in uno falsus in omnibus' is not applicable in India. In each case the court has to appraise the evidence to see to what extent it is worthy of acceptance and merely because in one respect the court considers it insufficient to rely on the testimony of a witness, it does not necessarily follow as a matter of law that it must be discarded in all respects. The experience has shown that there is tendency on the part of witnesses to exaggerate the guilt of the opposite party and then the imperfection of human memory and of observation also shows that the broad rule that the witnesses who have been disbelieved in respect of the acts imputed to some accused cannot be relied upon for convicting the other accused cannot be laid down as a sufficient guide for all the cases. The Court has to sift the evidence with care in each case and on full consideration of all relevant material circumstances to come to a decision, which part of the testimony of the witnesses is to be accepted and which is to be rejected. In other words, the witnesses cannot be branded as liars in toto and their testimony rejected outright even if parts of their statements are demonstrably incorrect or doubtful. The Court has to separate the grain of acceptable truth from the chaff of exaggerations and improbabilities which cannot be safely or prudently accepted and acted upon. The dictum 'falsus in uno falsus in omnibus' is not a sound rule for

the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments. The mere fact that the evidence of the prosecution witnesses is not firm and safe enough to be relied upon with regard to the part assigned to one accused in the occurrence, is no ground to reject it mechanically against other accused also. This is the gist of what their Lordships of the Supreme Court laid down in the case of *Bhagwan Tana Patil v. State of Maharashtra*, 1974 SCC (Cri) 11 : (AIR 1974 SC 21) and in the case of *Bava Hajee Hamsa v. State of Kerala* (1974 SCC (Cri) 515) : (AIR 1974 SC 902).

33. In the instant case, the fact that the testimony of the eye-witnesses is not acceptable as against the accused-appellants Rakesh does not mean that they were lying. But the situation, in fact, is that having regard to the attending circumstances, their testimony against him is found to be doubtful in nature and, therefore, it is not accepted against him. There is difference between 'falsehood' and 'doubtful'. The eye-witnesses are being disbelieved as against Rakesh as his participation in the crime is doubtful. They are not disbelieved against him on account of their testimony against him being false. The benefit would go to him, and not to the two other accused-appellants who are proved to the hilt to be the real assailants who committed this crime in furtherance of their common intention.

34. In the net result, we partly allow this appeal. The conviction and sentence passed by the trial Court against accused-appellant Rakesh is set aside. If in Jail, he shall be set at liberty if not wanted in any other connection.

35. The appeal is dismissed insofar as the accused-appellants-Rajendra Kumar alias Rajjan and Basant are concerned. Their conviction under Section 302, I. P. C. read with Section 34, I. P. C. and sentence of life imprisonment passed thereunder by the trial Judge are affirmed. The accused-appellants-Rajendra Kumar alias Rajjan and Basant, who are in Jail, shall serve out their sentence.

36. The judgment be certified to the lower Court to report compliance within two months from the date of receipt of a copy of this order.

