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**Gulab Vs. State**

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**SooperKanoon Citation** : sooperkanoon.com/485213

**Court** : Allahabad

**Decided On :** Nov-27-1995

**Reported in** : 1996CriLJ2247

**Judge** : S.K. Verma and ;B.S. Chauhan, JJ.

**Acts** : Indian Penal Code (IPC), 1860 - Sections 302

**Appeal No.** : Criminal Appeal No. 3278 of 1979

**Appellant** : Gulab

**Respondent** : State

**Advocate for Def.** : D.G.A.

**Advocate for Pet/Ap.** : P.N. Misra, Adv.

**Disposition** : Appeal allowed

**Judgement** :

**B.S. Chauhan, J.**

1. The present appeal has been filed against the judgment and ordfer of the V Addl. Sessions Judge, Bulandshahr dated 10-12-1979 passed in Sessions Trial No. 274 of 1979 convicting and sentensing the appellant under Section 302, IPC to undergo imprisonment for life.

2. The prosecution case is that on 27-3-1979 at about 6-30 p.m. the appellant along with one coaccused appeared in front of Ashok Kumar (Deceased) who was going to his village after appearing in the examination of XII Class from Gulaothi on bicycle and on being instigated by the said co-accused, the appellant fired the first shot from his single Barrel Gun, which hit Ashok Kumar on the right side of his chest and fired the second shot when deceased Ashok Kumar tried to run towards the appellant and another. The second shot hit Ashok Kumar (deceased) in the chest. Ashok Kumar fell down there. The incident was seen by Ashok Veer (P.W. 1) and Jagdish Prasad (P.W. 2), one Dalip (not examined), who were coming behind the deceased on their respective bicycle. Ashok Veer (P.W. 1) came to the village after travelling the distance of about four furlongs and took a Buggi, reached back the place of occurrence and took the deceased Ashok Kumar in that Buggi and brought him to his house in the village. While in the way to his house Ashok Kumar (deceased) succumbed to the injuries at about 7-30 p.m. The FIR of the said incident was lodged on the next day, i .e. 28-3-1979 at P.S. Gulaothi at 7-20 a.m. as the place of occurrence did not fall within the territorial limits of P.S. Gulaothi, the case was transferred to P. S. Sikandrabad and after completing the formalities, the Investigating Officer, Yashpal Singh (P.W. 4) recovered the dead body and sealed it after Panchayatnama and sent the same for postmortem along with Sompal Singh-constable (P.W. 9). The postmortem was conducted by Dr. G. N. Srivastava (P.W. 7) who found the following anti-mortem injuries on the person of the deceased.

1. Gun fire arm wound 3/4' x 1/2' x cavity deep on upper chest region. 2' above the right nipple 2'/i' below the right clavicle with blackening and scorching seen and blood clotted seen.

2. Fire arm wound on upper part right arm and no blackening scorching seen with blood clot 3/4' x 1/2' mucle deep and bone deep.

3. Fire arm wound Vi' x 1/2' cavity deep on upper lateral part right back 6' x lateral and above the right nipple with blackening and scorching seen margin inverted.

4. Fire arm wound 1 1/2' x 1' cavity deep on upper part left back with no blackening or scorching seen. Margin averted outside.

3. In the opinion of Dr. G. N. Srivastava (P. W. 7) the cause of death was due to shock and haemorrhage as a result of antimortem injuries. Yashpal Singh, S.I. (P.W. 4) examined the prosecution witnesses particularly Ashok Veer (P.W. 1) Jagdish Prasad (P.W. 2) and Munshi Singh Yadava (P.W. 3) and after completing the investigation submitted the charge-sheet against the appellant. After committal to the Sessions the appellant was tried.

4. In support of its case prosecution examined nine witnesses. Ashok Veer (P.W. 1) and Jagdish Prasad (P.W. 2) had been the eye witnesses of the incident. Munshi Singh Yadava (P.W. 3) was examined to corroborate the evidence of eye-witnesses. Yashpal Singh and Gopi Chand (P.Ws. 4 & 5) had been the two Investigating Officers, Dharampal Singh (P.W. 6) was the witness of inquest, Dr. G. N. Srivastava (P.W. 7) proved the post-mortem report, Satyapal Singh and Sompal Singh (P.Ws. 8 & 9) are the police constables and formal witnesses.

5. In defence the appellant pleaded not guilty and further stated that he has falsely been implicated because of enmity. He further stated that Ashok Veer (P.W. 1) informant was having illicit relationship with the mother of the deceased which was not liked by Ashok Kumar, deceased and he always opposed the said relationship. Thus, Ashok Veer (P.W. 1) might have killed Ashok Kumar, deceased, and has falsely enropped the appellant. Learned trial Court after considering the entire evidence came to the conclusion that the appellant committed the murder of Ashok Kumar, deceased, and convicted him for the offence punishable under the provisions of Section 302, IPC and sentenced him to undergo imprisonment for life.

6. We have heard Sri P. N. Misra, learned Senior Advocate for the appellant and the learned A.G.A. for the State. While making the persuasive and deligent submissions Sri P.N. Misra took us through the entire evidence on record and insisted on the following points which according to him do not furnish any plausible explanation for the prosecution case: .

1. That the FIR was lodged after 13 hours though the distance of the police station from the place of occurrence had been only six miles. The offence was committed at 6-30 p.m. on 27-3-1979 and it was not so late 6-30 to lodge the report promptly.

2. That Ashok Kumar, deceased, who received the gun-shot injuries at 6-30 p.m. succumbed to the injuries at 7-30 p.m. while he was being taken to his village, no attempt was made for complete one hour to take him to the Hospital.

3. None of the family members of Ashok Kumar, deceased came forward either to lodge the FIR or to depose in respect of any part of the prosecution case, at least the father, mother and the wife of Ashok Kumar, deceased might have been in the position to depose about the strained relationship between the appellant and Ashok Kumar. Deceased as the consistent case of the prosecution had been that Ashok Kumar deceased had developed illicit relationship with the wife of the appellant who was the resident of the village of Ashok Kumar deceased.

4. The eye-witnesses have deposed that 50-100 persons had gathered at the place of occurrence, but none of them could gather courage to go to the police station to lodge the FIR because of the terror of the appellant. The appellant was not resident of that area and had run away from the place of occurrence after committing the offence.

5. According to Ashok Veer (P.W. 1) himself he had gone to lodge the FIR as Suresh, the brother of the deceased had asked him to lodge the FIR Munshi Singh Yadava (P.W, 3) deposed that he had asked the wife of Ashok Kumar, deceased, to lodge the FIR but she did not reply.

6. Ashok Veer (P.W. 1) was having the criminal record and having no relationship with the deceased had taken every possible step to complete all the formalities in the case.

7. Ashok Veer (P.W. 1) and Jagdish Prasad (P.W. 2) were merely the chance witnesses as they could not furnish any plausible explanation for being present on the place of occurrence.

8. The brother of Ashok Kumar, deceased, came to the place of occurrence while the mother met them when Ashok Kumar deceased was taken to the village, but none of them has been examined by the prosecution.

9. One Dilip who was also coming along with Ashok Veer (P.W. 1) and Jagdish Prasad (P.W. 2) was also withheld by the prosecution.

10. The Investigating Officer did not recover the gun of the appellant nor the empty cartridges were recovered from the place of occurrence.

11. That the appellant had fired with the single barrel gun and after firing the first shot there was sufficient time to fire the second shot and Ashok Veer (P.W. 1) and Jagdish Prasad (P.W. 2) had been present at the place of occurrence, they could have definitely tried to overpower the appellant or at least intervene in the incident and could have definitely prevented the appellant from firing the second shot.

12. That the prosecution withheld the material witness', Dilip, who was accompanying Ashok Veer (P.W. 1) and Jagdish Prasad (P.W. 2).

There is considerable force in the submission of Mr. P. N. Misra as in the case of State of Punjab v. Jagir Singh, AIR 1973 SC 2407: (1973 Cri LJ 1589), the Supreme Court has held as under:-

A Criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the Court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is exfacie trustworthy on grounds which are fanciful or in the nature of conjectures'.

7. Sri P. N. Misra, learned counsel for the appellant has vehemently and articulatedly argued that ocular evidence is totally inconsistent with the medical evidence.The consistent evidence of both the prosecution witnesses, Ashok Veer (P. W. 1) and Jagdish Prasad (P.W. 2) had been that the appellant fired the first

shot when Ashok Kumar, deceased, moved towards the assailant-appellant, the appellant fired the second shot, though according to the medical evidence the injuries found on the person of Ashok Kumar, deceased, were caused by minimum three shots. On this particular issue this Court has summoned the Ballistic Expert as Court witness and examined him on 6-2-1995 who has given a definite . opinion that injury Nos. 1, 2 and 3 had been caused by minimum three shots and injury No. 4 was the exit Would of injury No. 1. Even in the trial Court Dr. G. N. Srivastava (P.W. 7) has given the same opinion. He has deposed that injury Nos. 1 & 3 could not be caused by a single shot as both the said injuries were having scorching and blackening, but learned trial Court has rejected the said evidence of Dr. G. N. Srivastava (P.W. 7) observing as under:-

Adverting to the statement of Dr. G. N. Srivastava (P.W. 7) the less said the better. The medical officer is badly mistaken if he says that the Bullet injury Nos. 1 & 2 were not the result of one shot. The reasons advanced by medical officer about the two wounds being not the result of one shot is that since there is some blackening and scorching on wound No. 1 which is conspicuously lacking on wound No. 2. He however, admitted' in para 7 of his original statement at page No. 5, that if two pellets of one shot penetrate into the body, then they will cause wounds having blackening and scorching.

8. The Medical Officer reluctantly made his statement on the point that the deceased sustained three gun shots. In my opinion the medical officer was not a ballistic expert as he himself admitted and that being so he was not justified in having stated that 4 gun shot wounds sustained by the deceased were the result of three shots. The medical officer should not have proclaimed himself to be an expert on the point whether the gun shot wounds were the result of two or three gun shots. In my opinion these signs of blackening or scorching are relevant for determining the distance of the gunner vis a vis the victim or aim. The presence of blackening and scorching, in my opinion indicates that the deceased was fired upon from a close proximity of 5 or 6 steps. Blackening occurs due to non-consumption of the powder in cartridges and scorching occurs when shot is fired from close proximity. Dr. G. N. Srivastava's testimony on the point of number of shots being not based on any expert's evidence cannot be believed. It will

therefore emerge out that the four injuries are the result of two shots and not of three shots as claimed by the medical officer.

9. We have considered the injuries, the deposition of Dr. G. N. Srivastava (P.W. 7) and of Sri O.P. Mani Tripathi (C.W. 1), the Ballistic Expert and we are of the considered opinion that the said injuries could be caused by firing minimum three shots and, thus, we are of the view that the contention of Sri P. N. Misra, learned counsel for the appppellant is very persuasive and forceful. In the case of Ram Narain v. State of Punjab, AIR 1975 SC 1727: (1975 Cri LJ 1500) the Supreme Court has observed as under:-

It is obvious that where the direct evidence is not supported by the expert's evidence, then the evidence is wanting in the most material part of the prosecution case and it would be difficult to convict the accused on the basis of such evidence.'

The similar view has been taken by the Supreme Court in the case of Amar Singh v. State of Punjab, AIR 1987 SC 826 : (1987 Cri LJ 706).

10. In the case of State of Haryana v. Lakhbir Singh, AIR 1990 SC 2154, the Supreme Court has held that if the entire version of the prosecution and the evidence of the eye-witnesses are directly inconsistent with the opinion of the medical officer whose opinion is based on the nature of the injuries suffered by the deceased, then the prosecution case can be termed as either perverse or falacious unless there are compelling reason is to take the contrary view.

11. In the case of State of Haryana v. Manoj Kumar, AIR 1994 SC 147:(1993 Cri LJ 3839) it has been observed that the delay in lodging the FIR isan important factor, but if the Court is not expected to reject the whole prosecution case mainly on this ground. In the instant case the delay of 13 hours has not satisfactorily been explained. There is clear evidence on record that 50-100 people had gathered and it is most unnatural and improbable that none of them had courage to go to the police station at 7 a.m. in the month of March to lodge the FIR, particularly the appellant was alone and was not belonging to that area and even according to the case of the prosecution he had run away from the place of occurrence after committing the offence. Thus, the only possible conclusion which a prudent person

may take that the delay has not satisfactorily been explained. It appears that the prosecution has not placed the entire case before the learned trial Court.

12. In the case of Mohar Rai v. The State of Bihar (1968) 3 SCR 525:(1968 Cri LJ 1479) the Supreme Court has held that such circumstances would itself show that the evidence of the prosecution witnesses relating to the incident is not true or at any rate not wholly true and further held that it is a solemn duty of the prosecution to place before the court the whole truth and the circumstances noted above not merely affect the value and weight to be attached to the prosecution evidence, but may convince the court that the prosecution version is doubtful.

13. A similar view has been taken by the Supreme Court in the case of Lakshmi Singh v. State of Bihar, AIR 1976 SC 2263 : (1976 Cri LJ 1736).

14. The two main factors, the unexplained delay in lodging the FIR and the material inconsistency of the ocular and the medical evidence persuaded rather compelled us to reach the conclusion that the offence had not been committed in the manner as alleged by the prosecution. Thus, we are of the considered opinion that the prosecution has suppressed the genesis and the origin of the occurrence and had not presented the true version before the learned trial Court which itself is enough to discredit the prosecution case as a whole.

15. In view of the above, the appeal is allowed.

16. The judgment and order of the learned trial Court dated 10-12-1979 passed in Sessions Trial No. 274 of 1979 convicting and sentencing the appellant under Section 302, IPC to undergo imprisonment for life is set aside. The appellant is on bail, his bail bonds are cancelled and sureties are discharged.

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