

Ramesh and ors. Vs. the State

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Court : Allahabad

Decided On : Jul-02-2003

Reported in : 2004CriLJ1877

Judge : Vishnu Sahai and ;Kamal Kishore, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 300 and 302; [Evidence Act, 1872](#) - Sections 114

Appeal No. : Capital Sentence Reference No. 3 and Crl. Appeal No. 672 of 2001

Appellant : Ramesh and ors.

Respondent : The State

Advocate for Def. : Anadi Banerji, Adv.

Advocate for Pet/Ap. : Nagendra Mohan, Adv.

Judgement :

Vishnu Sahai, J.

1. Seven persons, namely, Ramesh, Jagdish, Putti Lal, Ramrikh, Suraj Prasad, Ravindra Singh and Vishwaraj Singh were charged by the Additional Sessions Judge/Special Judge, under the Essential Commodities Act, Hardoi for offences punishable under Sections 148, IPC, 302 read with 149, IPC, 307 read with 149,

IPC and 404, IPC. The learned Judge found all of them guilty for offences punishable under Sections 148, IPC, 302/149, IPC and 307/149, IPC. In addition, he found Ravindra Singh guilty for the offence punishable under Section 404, IPC. The learned Judge sentenced Ramesh and Jagdish to death under Section 302/149, IPC and the remaining five persons to imprisonment for life under the said section. He sentenced all seven of them to undergo 7 years' R.I. for the offence punishable under Section 307 read with 149, IPC and 2 years' R.I. for the offence punishable under Section 148, IPC. He also sentenced Ravindra Singh to undergo 2 years' R.I. for the offence punishable under Section 404, IPC. He directed that the sentences of the said persons on all the counts shall run concurrently.

Capital Sentence Reference No. 3 of 2001 arises from the statutory reference made by the trial Judge under Section 366, Cr. P.C. for confirmation of death sentences of Ramesh and Jagdish.

Criminal Appeal No. 672 of 2001 has been preferred by all the seven accused persons, namely, Ramesh, Jagdish, Putti Lal, Ramrikh, Suraj Prasad, Ravindra Singh and Vishwaraj Singh against the aforesaid convictions and sentences.

Since both the Capital Reference No. 3 of 2001 and Criminal Appeal No. 672 of 2001 arise out of a common factual matrix and the same judgment, we are disposing them of by one judgment.

2. The prosecution case, in short, is as under :--

The informant Smt. Reshma (PW- 1) is the daughter of the deceased Babu. In 1981 appellant Ramesh and his brother Naresh, who died prior to the commencement of the trial, fired on the deceased Babu and were sentenced to 7 years' R.I. for the same. The remaining six appellants and one Patte alias Vishambhar Nath, who was not put up for trial for reasons which are not manifest from evidence on record, are the associates of Ramesh and Naresh. Ever since Ramesh and Naresh had been convicted for firing upon Babu, they and the remaining persons started nursing a grudge against Babu.

On 25-9-90 at about 7.00 a.m. Babu was sitting along with Abid (P.W. 10) on a cot behind the back of his house, situated in Village Newada Loch within the limits of Police Station Beniganj, District Hardoi. Both of them were peeling corn at that time. Babu had a single barrel licensed gun and a cartridge belt containing seven cartridges along with him. At that juncture, the informant was sitting at the front door of the house. At that time, appellants Ramesh, Jagdish and accused Naresh armed with hand grenades, appellants Putti Lal, Vishwaraj Singh and Ravindra Singh armed with guns, appellants Suraj Prasad, Ramrikh and accused Patte alias Vishambhar Nath armed with country made pistol, came there. Appellants Ramesh, Jagdish and accused Naresh hurled hand grenades on the person of Babu as a consequence of which Babu's head and neck were fatally injured and Abid also sustained injuries. In the meantime, Ravindra Singh picked up the single barrel gun and the belt of cartridges of Babu. Apart from the informant Smt. Reshma, this incident was seen by Idris (P.W. 2), the nephew of the deceased and co-villagers Kallu and Bhelu. Hearing, the sound of bursting of hand grenade a number of persons rushed from the village. Then, those appellants who were armed with guns and country made pistols and accused Patte alias Vishambhar Nath who was armed with country made pistol fired three to four rounds in the air with a view to scare away those who had assembled.

After the appellants and others had run away, the informant Smt. Reshma got the FIR scribed by Idris. Thereafter, Idris read over the same to her and she signed it. Thereafter, Reshma proceeded with the FIR to Police Station Beniganj.

3. The evidence of Sub-Inspector Shiv Swaroop Tewari (P.W. 11) shows that on 25-9-90 (the date of the incident) at about 10.15 a.m. the informant Reshma came to Police Station. Beniganj and lodged her FIR in the presence of ASP R. D. Pandey. On the basis of the FIR a case was registered against the appellants and others and thereafter ASP R. D. Pandey transferred the investigation to S. I. Shiv Swaroop Tewari.

It is pertinent to mention that the distance between the place of incident and Police Station Beniganj is six kilometres.

4. The evidence of Sub-Inspector Shiv Swaroop Tewari shows that after the investigation had been handed over to him he proceeded to the place of incident. He found behind the house of the deceased Babu a cot and the corpse of Babu on it. He also found blood on the cot and Abid lying in an injured condition near the cot. He sent Abid for medical examination.

5. The evidence of Dr. P. K. Gangwar (P.W. 4) shows that on 25-9-90, at about 12.45 p.m., the victim Abid was brought to the District Hospital. Hardoi. He medically examined him and found on his face, chest, right shoulder and left leg a number of lacerated wounds. In his opinion, the said injuries were attributable to hand grenade.

6. The evidence of Sub-Inspector Shiv Swaroop Tewari shows that after sending Abid for medical examination he recorded statements of witnesses and thereafter on the directions of ASP R. D. Pandey prepared the inquest of the corpse of deceased. He seized from the place of incident plain and blood stained earth and also prepared the site plan. He also did some other things during the course of investigation, but since in our judgment a reference to them is not necessary for the decision of this case, we are not adverting to them.

On completion of investigation, the appellants were charge-sheeted.

7. Going backwards the autopsy on the corpse of the deceased was conducted by Dr. Rajendra Shukla (P.W. 7) who found on it the following ante-mortem injuries :--

'(1) Phata Hua Ghav 26 cm x 22 cm x Mastishk Ki Cavity Khuli Hui Phate Hui Vem Par Kati Hui Thi Jiske Kinare Phate Huye The, Jahan Haddi Ke Tukde Va Mastishk Ke Bhag Jagah Va Jagah Lage Huye The. Gardan Ke Pichhle Upari Bhaag Me Khal Ke Tukdo Se Latka Hua Gal Va Thiddi Ke Bhag Laga Hua Tha Tatha Shesh Mastishk Tatha Chehre Ka Bhag Mojud Nahin Tha.

(2) Goli Ghusne Ke Bahut Se Ghav 10 cm x 6 cm Ke Dayre Me Dahine Putthe Ke Samne Ke Bhag Par Vibhinn Nap Khal Se Mans Ki Gahrai Tak The Jinki Naap 3 cm x 5 cm Se 5 cm x 1 cm Ke The Jinke Kinare Ragde Huye Andar Ki Aur Mude Huye Va Kate Huye The Tatha Kalima Mojud Thi.

(3) Goli Ke Ghusne Ka Ghav Khal Se Mans Ki Gahrai Tak Aniyamit Aakar Mai The Jo 3 cm x .75 cm Se 5 cm x 1 cm Ke The. Jo Ki Dahini Agrabahu Ke Bahri Kinare Par Mojud The Jinme Kalima Mojud The Tatha Dahini Kohni Par Tattooing Tatha Kinare Andar Ki Aur Mude Huye The Jo Ki 17 cm x 7 cm Ke Kshetra Mai Mojud The.

(4) Mool Post Mortem Ke Kinare Kate Hone Ke Karan Aanshik Roop Se Purn Rupan Nahin Padhi Ja Sakti Tatha Missing Hai.

(5) Anek Aakar Ke Ragad Ke Nishan .5 cm x 3 cm Se 5 cm x 1 cm Pet Mai Dahini Aur 14 cm x 9 cm Ke kshetra Mai Nabhi Se Dahini Aur The.

(6) Anek Ragad Ke Bhinn Aakaro Mai Nishan .5 cm x .3 cm x .75 cm Ki Naap Mai Bai Bhuja Va Agrababu Tatha Kohani Samet Par 10 cm x 6 cm Mai Mojud The.

(7) Anek Kate Huye Ghav .5 cm x .75 cm x Khal Se Maans Ki Gahrai Tak Dahini Jaangh Mai Upar Va Beech Ke Bhag Mai Mojud Thi.

(8) Ragad Ke Anek Nishan .5 cm x .75 cm Seene Ke Dahini Aur Beech Ke Bhaag Mai Gardan Ke Nichle Bhaag Tak Jaate Huye Mojud Thi.'

The English translation of the said injuries would read thus :--

(1) Lacerated wound 26 cm x 22 cm x brain deep, cavity open and cut, edges lacerated, pieces of bone found behind neck, pieces of skin hanging.

(2) Multiple fire arm wounds of entry in an area of 10 cm x 6 cm in front of the right shoulder, skin to muscle deep, margins inverted, blackening, present.

(3) Fire arm wound of entry, skin to muscle deep in an area of 3 cm x .75 cm x 1 cm on the front portion of the right forearm accompanied with blackening and tattooing.

(4) On account of the edges of the postmortem being cut it is not legible,

(5) Marks of friction of different dimensions .5 cm x .3 cm to .5 cm x 1 cm on the right side of stomach in an area of 14 cm x 9 cm.

(6) Number of marks of friction in an area of .5 cm x .3 cm x .75 cm on the left forearm.

(7) Multiple incised wounds of .5 cm x .75 cm from muscle to skin deep on right thigh.

(8) Multiple marks of friction .5 cm x .75 cm on the right side of chest and lower part of neck.

In injury No. 1 three pieces of glass, one pellet and one nail were found. In the stomach 150 cc of liquid was found.

In the opinion of Dr. Shukla the deceased died on account of ante mortem injuries suffered by him and the said injuries could have been sustained by him on 25-9-90, at about 7.00 a.m. Dr. Shukla also stated that the cut injuries were attributable to a hand grenade and the ante mortem injuries suffered by the deceased were sufficient in the ordinary course of nature to cause his death.

8. The case was committed to the Court of Sessions in the usual manner, where the appellants were charged on the counts mentioned in paragraph 1. They plead not guilty to the charges and claimed to be tried. Their defence was of denial. From the tenor of cross-examination of eye-witnesses it appears that the defence case is that the deceased and the injured Abid were assaulted sometimes in the very early hours of morning, while it was still dark and the real assailants could not be identified.

During the trial, in all, 12 witnesses were examined by the prosecution three of them, namely, Reshma (P.W. 1), Idris (P.W. 2) and Abid (P.W. 10) were examined as eye-witnesses. The learned Trial Judge believed the evidence of Reshma and Idris in entirety, that of Abid in respect of date, time, place of incident, presence of Reshma and Idris and his and Babu sustaining injuries, rejected the defence of the appellants and convicted and sentenced them in the manner stated in paragraph 1, As mentioned in the said paragraph he sentenced two of them, namely, Ramesh and Jagdish to death for the offence punishable under Section 302 read with 149, IPC and the others to imprisonment for life on the said count. As also

mentioned earlier, he also convicted and sentenced them on other counts.

As mentioned earlier, Capital Sentence Reference No. 3 of 2001 arises from the reference made by the learned Trial Judge for confirmation of death sentences of Ramesh and Jagdish and Criminal Appeal No. 672 of 2001 has been preferred by the seven appellants against their aforesaid convictions and sentences.

9. We have heard learned counsel for the parties and make no bones in observing that the reference made by the learned Additional Sessions Judge for the confirmation of death sentences of Ramesh and Jagdish, which has given rise to Capital Sentence Reference No. 3 of 2001, warrants to be rejected and Criminal Appeal No. 672 of 2001 deserves to be allowed. We have reached this conclusion after perusing the depositions of the prosecution witnesses; after examining the material exhibits tendered and proved the cross-examination; after perusing the statements of the appellants recorded under Section 313 Cr. P. C.; and after going through the impugned judgment.

10. As we have seen the conviction of the appellants is founded on the ocular account furnished by Smt. Reshma (PW-1), daughter of the deceased; Idris (PW-2), nephew of the deceased; and Abid (PW-10). In our judgment, their evidence cannot be accepted.

We propose examining their evidence and furnishing reasons for reaching the said conclusion.

11. We begin with the evidence of Smt. Reshma, the married daughter of the deceased. She stated that on the date and time of the incident she had come to the house of deceased Babu who was her father. At the time of incident she was sitting at the Chaukhat of the door of the house and the deceased was sitting behind his house on a cot along with Abid, peeling corn. She has also stated that Idris (PW-2), the nephew of the deceased, was also present in the house.

Her evidence shows that on the date and time referred to above, appellants Ramesh, Jagdish and accused Naresh, armed with hand grenades; appellants Putti Lal Vishwaraj Singh and Ravindra Singh armed with guns; and appellants

Suraj Prasad, Ramrikh and accused Patte alias Vishambhar Nath armed with country-made pistols came. Her evidence also shows that appellants Ramesh and Jagdish and accused Naresh hurled hand grenades as a consequence of which the head of deceased Babu was virtually tattered and Abid who was sitting on the same cot was also injured. Her evidence further shows that apart from her and Idris, co-villagers Kallu and Bhelu saw the incident. Her evidence also shows that hearing the sound of bursting of hand grenades a number of villagers came and in order to disperse them these appellants who were armed with guns and country made pistols and accused Patte alias Vishambhar Nath who was armed with a pistol fired in the air.

12. We have examined the evidence of Reshma and have no compunction in observing that we are loathe to accept their claim of having seen the incident. We say this for a number of reasons. Firstly, she has categorically stated in her F. I. R. that she was sitting in the front door of the house. In her cross-examination she admitted that from there she could not see what was happening at the back of the house. She has also stated therein that Darogaji told her that since from the front door of the house she could not see the incident she should state that she was sitting on the back door of the house. She has stated that for the said reason she modulated her statement from sitting in front of the house to that of sitting at the back of the house. In our view this reason alone is sufficient to reject her testimony; more so because being the daughter of the deceased she is an extremely interested witness and the law enjoins that the testimony of an interested witness should be evaluated with caution.

But there is a more basic infirmity in her evidence which renders it unworthy of acceptance and that is that ante mortem injuries No. 2 and 3 are multiple fire arm wounds of entry and her evidence does not explain how the deceased sustained them. She has not stated that the deceased was fired upon by any of the accused persons and instead has emphatically mentioned that when people from village came, those armed with fire arms fired three to four rounds in the air, with a view to scare them. It is pertinent to mention that the autopsy Surgeon Dr. | Rajendra Shukla in his cross-examination has candidly stated that injury Nos. 2 and 3 were attributable to gun and pistol and in them he did not find any remnants of hand

grenade, but instead found a pellet.

13. It is thus obvious that the deceased was also fired upon and sustained two fire arm injuries and the ocular account furnished by Reshma completely fails to explain them. Had Reshma seen the incident she would have explained how the deceased suffered fire arm injuries. In our judgment the suggestion given to Reshma and the submission of appellants' counsel that the incident did not take place on 25-9-1990 at 7.00 A.M. as alleged by the prosecution, but took place sometimes in the early hours of the same morning, while it was still dark, appears to be correct.

14. For the aforesaid reasons the evidence of Reshma deserves to be rejected and we accordingly reject it.

15. We now come to the evidence of Idris. We have already mentioned that he is the nephew of the deceased. His evidence shows that the deceased was his Phoopha (husband of his father's sister). We are not oblivious to the fact that on this ground alone the testimony of Idris cannot be mechanically rejected, but would only be evaluated with caution. We dare say that once we do so it would be impossible to accept it. We may mention that the mode of assault furnished by Idris is identical to that of given by Reshma. Like Reshma, Idris has also stated that appellants Ramesh and Jagdish and accused Naresh hurled hand grenades on the deceased and did not state that those armed with the fire-arms fired upon the deceased. Like her, he has stated that they fired three to four rounds in the air to disperse those who had subsequently arrived from the village. While discussing the evidence of Reshma we have mentioned that two of the injuries suffered by the deceased were firearm injuries. In our view, the evidence of Idris also does not explain how the deceased Babu sustained fire arm injuries. In that view of the matter no reliance can be placed on it.

16. For the said reasons we reject the evidence of Idris.

17. We now come to the evidence of Abid (PW-10), the injured witness. It is pertinent to mention that his evidence sets out an entirely different version. He stated that only one of the accused persons, namely, Ramrikh, was present and

he hurled a hand grenade resulting in injuries being sustained by the deceased Babu and him. He does not depose about the presence of any other accused person. He was declared hostile and was cross-examined by counsel for the prosecution. He was confronted with those portions of his statement under Section 161 Cr. P. C. wherein he had given an ocular account, but he candidly disowned having made them and stated that he did not know how the Investigating Officer recorded them.

It is thus obvious that Abid has come out with altogether a new case that it was Ramrikh who hurled the hand grenade. We have seen that this is in contradiction to the evidence of Reshma and Idris, who stated that it were appellants Ramesh and Jagdish and accused Naresh who hurled hand grenades.

18. For the said reasons we have no reservation in rejecting his testimony. It should be remembered that injuries only guarantee the presence of a witness, but do not ensure his truthfulness and a injured witness, like any other witness has to pass the test of truthfulness before his evidence can be accepted. We make no bones in observing that Abid has failed the said test. He is anything but a truthful witness.

19. For the said reasons, in our view, the evidence of all the three eye-witnesses, namely, Reshma (PW-1), Idris (PW-2) and Abid (PW-10) does not inspire confidence. In our view, the learned Trial Judge grossly erred in accepting and convicting the appellants upon it.

20. Before we proceed to the operative part of the judgment we would also like to give three other reasons as to why we are not inclined to accept the prosecution case.

Firstly, we have seen that right from the F. I. R. the prosecution case is that co-villagers Kallu and Bhelu saw the incident. It is pertinent to mention that neither of them were examined by the prosecution and the reason furnished by it for their non-examination which is contained in the examination in chief of Idris (PW-2), that on account of fear they and Abid were not prepared to depose against the appellants is untenable because Abid was examined by it as PW 10. In this

connection, we would like to advert to the decision of the Apex Court reported in AIR 1971 SC 1586 : 1971 Cri LJ 1173 (State of U. P. v. Jaggo alias Jagdish) wherein in paragraph 16 the Supreme Court has laid down that a mere averment by the prosecution in the form of an application that a witness has been won over is not sufficient and the said witness should be examined in Court.

In our view, the failure of the prosecution to examine Kallu and Bhelu is another nail in the coffin of the prosecution. In this connection we would also like to advert to the provisions contained in Section 114(g) of the Indian Evidence Act, which are to the effect that if evidence which could have been produced is not produced, the presumption would be that it would have gone against the party which withholds it. In our view, it would be reasonable to draw the said inference in this case.

Secondly, in our view, the probability of the F. I. R. being ante-time cannot be excluded. We have seen that according to the prosecution the incident took place on 25-9-1990 at about 7.00 A. M. and the F. I. R. was lodged the same day at 10.15 A. M. by Smt. Reshma, the daughter of the deceased, at Police Station Beniganj which was situated six kilometres from the place of the incident. We have also seen that after lodging of the F. I. R. the inquest of the corpse of the deceased was conducted. Had the inquest been performed after the F. I. R. had been lodged in the inquest report the name of the informant should have been mentioned as Smt. Reshma. However, we find that therein It has been mentioned as Idris. The Investigating Officer, SI Shiv Swaroop Tewari was cross examined on this aspect and admitted that the name of the informant in the inquest report has been mentioned as Idris. This in our view probabalizes the inference that first the inquest was performed and thereafter the F. I. R. was lodged by Reshma.

Thirdly, we have seen that the prosecution case is that at the time of incident the deceased along with Abid (PW-10) was sitting on a cot and a single barrel licensed gun of the deceased and a belt of cartridges containing seven cartridges was with him. In our view, had the incident taken place at about 7.00 A. M. (i.e. in broad day light) on 25-9-1990, as alleged by the prosecution, the deceased on seeing the appellants and others armed with hand grenades, guns and country made pistols coming towards him would have fired from his gun in order to save

himself. To us it appears that the incident took place in the early hours of the morning of 25-9-1990. while it was still dark. 21. In the result :--

(A) Capital Sentence Reference No. 3 of 2001:--

The reference made by the Trial Judge for confirmation of death sentences of Ramesh and Jagdish is rejected.(B) Criminal Appeal No. 672 of 2001 ;--Criminal Appeal is allowed. The convictions and sentences of all the appellants, namely. Ramesh, Jagdish, Putti Lal, Ramrikh, Suraj Prasad, Ravindra Singh and Vishwaraj Singh on all the counts are set aside. They are acquitted thereunder. Appellants Ramesh and Jagdish are in jail and shall be released forthwith unless wanted in some other case. Appellants Putti Lal, Ramrikh, Suraj Prasad, Ravindra Singh and Vishwaraj Singh are on bail. They need not surrender. Their ball-bonds shall stand cancelled and sureties discharged.

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