

Baloo Vs. State of U.P.

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Court : Allahabad

Decided On : Mar-28-2001

Reported in : 2001CriLJ3348

Judge : J.C. Gupta and ;S.K. Agarwal, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 302; Code of Criminal Procedure (CrPC) - Sections 145 and 161

Appeal No. : Cri. Appeal No. 2204 of 1980

Appellant : Baloo

Respondent : State of U.P.

Advocate for Def. : A. Kumar, D.G.A. and ;S.V. Goswami, Adv.

Advocate for Pet/Ap. : G.N. Sharma and ;Rajeev Asthana, Adv.

Disposition : Appeal allowed

Judgement :

1. This appeal arises out of a judgment and order dated 25-9-1980 passed by Sri M.P.S. Tomar, II Additional Sessions Judge, Mathura, in S.T. No. 338 of 1979 convicting and sentencing appellant Baloo son of Jamunadas to imprisonment for life under Section 302, I.P.C.

2. Brief facts of the case are that on 23-7-1979 at about 6.00 A.M. this appellant and his companions were trying to demolish walls of the compound of Smt. Ramdei, a widow, whose sons were residing in Amritsar, to draw electric line from the pole up to the house of Chetram. When the appellant and his three companions were busy in demolishing the wall, Dulichand came and raised an objection. They persisted with the felling of the walls. Dulichand then tried to call his associates, but he was fired upon by the appellant from a country made pistol from some distance. The shot hit Dulichand on his left as a result of which he fell down and died instantly. On his fall other associates of the appellant also beat him with Lathis. They are Bisso, Chhitar and Chhitarmal. Incident was witnessed by P.W.2 Purshottam Lal, P.W.3 Hariya, Deepa son of Roshan, P.W.4 Lachho and many other villagers. After the incident they demolished the remaining walls. The appellant and the above said accomplices of his took to their heels thereafter. The incident had occurred in front of the house of Ram. Swaroop. It is alleged in the F.I.R. as well as before the Court that the appellant and his associates stated that the deceased is the only thorn in their flesh, if he is killed then not only the road will be straightened but the electric line will also be easily drawn.

3. Post-mortem examination on the body of the deceased Dulichand was conducted by P.W.5 Dr. Daulat Ram on 24-7-1979 at 1.30 P.M. The doctor noticed only one fire arm entry wound of the dimension of 2 cm. x 2 cm. x brain cavity deep on the left side back of head occipital region 13 cm. above left ear with inverted margins and lacerated. No tattooing, charring and blackening was found. Underneath the said injury, parietal bone and occipital bone were found fractured. Membranes were lacerated and congested. Brain was also lacerated and deep haematoma was also detected. 25 pellets, one cardboard and three wadding pieces were removed from the injury. Small intestine was found empty. Large intestine, however, contained faecal matter. Bladder was found empty. According to the opinion of the doctor the death occurred due to coma as a result of the above head injury.

4. The investigation in this case was taken up by P.W.7 Moti Ram Shukla. Immediately after registration of the F.I.R. (Ext. Ka 1) he rushed to the spot and conducted inquest and prepared other papers pertaining to post-mortem

examination of the victim. He also prepared site plan, recovered blood stained bricks and plain brick from the place of occurrence and sealed them in separate containers. He had sent these Articles and the clothes of the victim to chemical examiner and to Serologist. The reports of the chemical examiner and the Serologist are on record as Exts. Ka-28 and Ka-29. According to the report of the Serologist, item No. 2, i.e. Dhoti worn by the deceased had human blood of 'O' Group. No determination of group of blood on items No. 1, 3 and 4, i.e. brick pieces, jacket and Langot, could be made because of its disintegration.

5. The prosecution in support of its case had examined P.W.2 Purshottam Lal, P.W.3 Hariya and P.W.4 Lachho as ocular witnesses. An affidavit of Constable Omvir Singh, the escort of the body, was filed. Another affidavit of Constable Jagbir Singh was also filed. He had taken the blood stained Articles to the chemical examiner.

6. The defence has also examined D.W. 1 Tota Ram in support of its case. The defence has denied the prosecution story.

7. According to the appellant, Ramdei was not the Tai (father's elder brother's wife) of Dulichand, the deceased. Her son Amar Chand, aged about 19 years, was living in the village. He was looking after her and the property. Dulichand was not doing the same. The Electricity Department was to fix a cemented pole instead of a wooden pole at the same place where it was earlier standing. Rest of the allegations that he had got an electric pole fixed in collusion with the officials of Hydel Department in front of the house of Ramdei and Dulichand raised an objection and made an application to the officials, which had been brought on record are denied by him. He had further stated that if these allegations were to be proved the prosecution ought to have produced evidence of the Hydel Department. He had further stated that the F.I.R. contained false allegations. All the witnesses belong to the same group. Purshottam Lal is brother of Dulichand. Hariya is his cousin. Appellant's brother Kishan had given evidence under Section 145 Cr. P.C. against Hariya. Lachho has a very poor vision. He is nearly blind. He has been involved on account of enmity. He had not committed any offence. His house is not in the vicinity of the place of occurrence. He had no concern with the

drawing of electric line. He is innocent. He had not committed this murder.

8. Before proceeding to scan the evidence of the above eye-witnesses it shall be relevant to refer to the acquittal of three accused persons, who were tried along with the appellant. These accused persons are Blsso, Chhitar and Chhitarmal, These persons were extended benefit of doubt by the learned Sessions Judge on the ground that there was no Lathi injury upon the person of the deceased Dullchand. He had held, 'Evidently the witnesses have given statements, as desired by the prosecution agency and such statements in the said regard of these witnesses cannot be believed to prove involvement and participation of the said accused beyond shadow of any reasonable doubt, even If they be believed in other regards'. So it is apparent from the finding of the learned Sessions Judge with regard to the three accused persons shows that he had not placed any reliance upon that part of the evidence of these witnesses which involved these accused persons. These accused persons were armed with lathis. The case of the prosecution was that after the fall of Dullchand, as a result of firearm injury, these persons also assaulted him with Lathis. In the inquest memo the I.O. had also noticed some contusion on the back but the doctor has very clearly noted down in the post-mortem report itself that none of these injuries were found on the person of the deceased by him. So they were extended benefit of doubt by the trial court and acquitted accordingly.

9. The defence has contended on the face of this acquittal that the learned Addl. Session Judge itself has found the evidence of these witnesses partly reliable and partly not reliable. In such a situation their evidence should not have been relied upon by the learned Addl. Sessions Judge without its corroboration from some independent source against the appellants. It is admitted to the prosecution that apart from the nominated witnesses, such as Hariya, Deepa and Lachho, the F.I.R. claims the presence of many villagers also at the spot at the time of incident, but neither Deepa nor any other villager was examined in support of these partisan and partly reliable witnesses. Therefore, it is contended by the learned counsel for the defence that the evidence of these witnesses should not have been relied upon by the learned Addl. Sessions Judge to convict the present appellant. It is further contended that the evidence of eyewitnesses is incompatible with medical

evidence. It was sudden fight. Exchange of abuses and heated exchange of words are admitted to the prosecution. Lastly, it has been urged before us that it is likely from the evidence of the Medical Officer (P.W.5) that the incident may have taken place an hour or so before the alleged time of occurrence, i.e. around 4.30/5.00 A.M. when it was quite dark.

10. In this case the prosecution has brought on record an application made by the deceased to different officials of the Government as well as officials of the Hydel Department, This application is dated 30-6-1979. By this application he had challenged the case of drawing of electricity line from the house of Smt. Ramdei to the house of Chetram. This application was proved by P.W. 1 Mahabir Prasad Gautam, the Diary Clerk in the Hydel Department. in his cross-examination this witness had stated that he did not know who was the line Inspector. He further stated that an enquiry was held on this application. It was enquired by S.D.O., Hydel, Koshi. According to him the result of the enquiry is lying in the Department. We are at a loss to find that the prosecution did not endeavour to bring on record the result of the enquiry. It was most relevant for the decision of this case, inasmuch as the case of the prosecution was that initially the line was passing through the roof of Jagan, Jagan had dismantled the line some 15/20 days before the incident and the appellant along with other companions of his were trying to take a line from the pole fixed in front of the house of Smt. Ramdei to the house of Chetram and for that purpose the demolition of the wall was necessary which they ultimately did. In these facts and circumstances that report would have been of great help to the prosecution case. Its non-production leaves no other plausible inference except that this report was not healthy for the prosecution case. Jagan, from over whose house this line initially was claimed to be passing, had also not been examined by the prosecution to strengthen its case. This is another infirmity for which no explanation was afforded by the prosecution. A nominated witness in F.I.R., viz. Deepa, had also not been examined. It has been stated by P.W. 2 Purshottam Lal that he had colluded with the appellant and his companions, but there is absolutely no evidence on record that this witness either colluded or was won over. No summon even was issued by the Court for his presence.

11. P.W.2 has stated that Dulichand was looking after his Aunt, Smt. Ramdei because her sons were living in Amritsar. The defence has disputed this contention. Apart from the partisan witnesses and related witnesses, no other witness was produced by the prosecution in support of this version that she was being looked after by Dulichand. The defence case is that she was looked after by her own 19 years old son. Smt. Ramdei was also alive. She could have been the best witness of this fact.

12. There is material conflict in the testimony of the witnesses and the medical evidence. According to medical evidence there were no Lathi injuries, whereas the prosecution case was that the deceased was assaulted with Lathis after his fall on the ground due to firearm injury. Absence of any Lathi injury on the victim creates serious dent in the story of the prosecution and goes to the extent of throwing serious challenge to the presence of these witnesses at the time of incident. This conflict further even creates serious doubt in the time of occurrence and manner of assault as well. The prosecution has made a vain attempt to explain the absence of lathi injuries. This is nothing but rubbing salt into the injury already caused. The prosecution itself had come up now in the trial Court with the case that the Lathis did not strike the victim. No doubt they were plied, but they collided with each other and fell on the ground. It is wholly unbelievable and the learned addl. Sessions Judge also did not accept this belated ingenious explanation. In the light of all this we propose to examine the evidence of the prosecution witnesses with regard to the present appellant.

13. The present appellant was armed with a firearm, a country made pistol. P.W.2 Purshottam Lal had clearly admitted that the distance between the deceased and the appellant was 7' (feet). According to him the barrel was actually 7' away from the victim. From a country made pistol if a fire is discharged from such a distance, sufficient dispersal is bound to occur, but in the present case it is an amass entry. There is no blackening, charring or tattooing either around the wound or inside. P.W. 5 Dr. Daulat Ram has admitted in cross-examination that it may have been a contact shot. According to him if a fire is made from beyond 4', there will be no blackening or tattooing. According to him, there is greater probability if there is no blackening or tattooing and the entry is amass that the barrel was in contact with

the skin when fire was made. He has further admitted in cross-examination that it is not written in his post-mortem examination report that any burnt or slightly burnt or unburnt powder was found in the wound. He has no remembrance of it also. Even the hair around the wound was also not burnt. These circumstances clearly indicate that the shot was fired after pressing the barrel on the head. The injury is on the left side of the head. The accused must have been on the left of the deceased. Absence of any food in the stomach and small intestine and presence of faecal matter in the large intestine further go to suggest that the victim did not yet evacuate. The Medical Officer had also opined that the victim had died before he had gone to ease, although in his report he had not said that the large intestine was loaded. Yet his statement to that effect is clearly suggestive of this fact. According to P.W.2 the victim had taken food at about 6.00 P.M. in the evening. If the prosecution time is taken to be correct then exactly 12 hours had elapsed since he had taken his last meal. Thus the medical evidence is in clear contrast and in conflict with the prosecution version. The defence version that the incident may have taken place at about 4.30/5.00 A.M. appears in these circumstances plausible and probable. The victim might have set out from his house to go to the Jungle to ease when he was done to death by some one in the cover of darkness. Apart from this the evidence of P.W.2 to the extent that an altercation had taken place, which ended into hurling of abuses from both sides before the occurrence. This was neither in the F.I.R. nor in their 161, Cr. P.C. statement. This improvement was purposeful because according to him he came out of his house only on hearing the noise from this altercation. From his evidence it also appears that the house in which he was living is at considerable distance from the place of occurrence. Number of houses intervene. None of the persons living in these intervening houses had arrived at the scene of occurrence. According to them, now only nominated witnesses Hariya, Gopi and Lachho alone came to the spot, whereas in F.I.R., apart from these named witnesses, arrival of many other villagers was also accepted. This has now been given up deliberately because in all probability the other villagers were not ready to support their false case.

14. The demolition of the Wall is also a doubtful event. No height of the wall was brought on record. It is common knowledge that electric wires are drawn at a considerable height, not less than 20'. P.W.2 has admitted that the electric wires

over the house of Jagan were drawn at a height of 30-35'. A boundary wall can never be more than 6' in height Normally, it is 3-4'. In the circumstances if a lint was to be drawn over the wall, unless it is shown by the prosecution that the wall was coming in the way as an obstruction in lying the wire, its demolition is not at all required. This is why the prosecution did not bring on record the enquiry report of S.D.O. on the application of the deceased dated 30-6-1979. Only the application has been brought on record. Whether any action was at all taken on this report is not available to us from the record. Non-examination of Jagan also leads to this inference. P.W.2 claimed that he continued to stay at his door and did dare to come near the place of incident until the incident had come to an end. If the altercation had taken place between his brother and the appellant and his companions, he would not have remained a silent spectator but immediately rushed to the spot. It is further stated by this witness that the incident had occurred when the deceased told the accused persons that he is going to call his men. We are, therefore, in serious doubt regarding the version given out by P.W.2. In view of these facts and discussions, we are of the opinion that P.W.2 Purshottam Lal is not a reliable witness. It is difficult for us to accept his partly reliable evidence without any pinch of salt. There is no corroboration from any independent source including the circumstances to his evidence.

15. Same is the position of P.W.3 Hariya. He is an inimical witness and is a relation of the deceased. No doubt in his evidence he has tried to conceal this, but it is apparent from the evidence of P.W. 1 Mahabir Prasad and also the defence allegation. D.W. 1 Tota Ram had filed a case against him in which Balloo had appeared as a witness. Therefore, he had motive to depose against the appellant. He was living at a considerable distance from the site of occurrence. He was also attracted by the noise created by the altercation. He did not come near the place of occurrence. He stayed on the road in front of his house. The story of exhortation that he is the only thorn in the flesh to kill him, so that the electric line may easily be drawn and the road may also be straightened, also appears to us an ornamentation designed in the course of trial by these witnesses. He has also blindly supported P.W.2 Purshottam Lal on the medical conflict part, i.e. use of Lathis by three acquitted persons upon the victim. The Addl. Sessions Judge has already discarded this part of his evidence. He had admitted that his grand father

was Chandan, but he had denied any knowledge of the name of his great grand father. He claimed that Chandan had no other brother, but P.W.2 contradicts him on this point. Therefore, he had been deliberately speaking lies to conceal his relationship with P.W.2 and the deceased. He admitted that a litigation was fought between him and Pungi, but pleaded ignorance that father of the appellant had appeared as a witness in that case on the ground that long time has elapsed since then. P.W. 3 Hariya has admitted that Kishan is real brother of appellant and stated that Kishan has never appeared in any case as a witness against him. He had also admitted that there is no other Kishan son of Jamunadas in the village. Therefore, from his evidence it appears that he had concealed his enmities with the appellant and his family members. He had stated that if any report of Marpit was lodged, he has no knowledge of it. He also denied holding of any Panchayat in that connection where he had tendered apology. He had very clearly admitted in cross-examination that he was attracted by the altercation. He stood on the road at that time also. When he came out, altercation was going on. He had found some portion of the wall already broken. He had also admitted that at the time of altercation deceased was at a distance of about 7-8 steps from the appellant. He further stated that when Balloo fired, the other person accompanying Balloo picked up their Lathis. He had further admitted, quite contrary to his earlier statement, that before firing he had not seen the appellant or his companions demolishing or uprooting the wall. His earlier statement was read over to him and then he stated that it was correct. He pleaded ignorance about the time when Jagan had removed these electric wire from his roof. He had not disclosed to I.O. whether Lathis were plied on Dulichand or not. He had claimed that only one blow each were given by the accused persons armed with lathis. According to him, spades were abandoned by the accused persons at the spot, but no spades were recovered by I.O. He had admitted that he could not see whether the accused persons Including the appellant had demolished the wall before their departure. His presence at the spot, therefore, is rendered doubtful from his deposition that during those days Bajra was being sown in the village, but he had not been to his field because his labour was doing his sowing and he stayed at his house. We are not prepared to accept that when sowing is being done at his field, he will remain at his house and leave it to his labour. He had not disclosed to I.O. that the wall was demolished by

Phawras. Thus, we do not find any merit in his testimony. As already stated, he had appeared against the appellant on account of enmity. We entertain no doubt in our mind that he did not witness the incident.

16. Coming to the testimony of P.W.4 Lachho, we find that he could not see anything. He was unable to identify his own Pradhan from a distance of 15-20'. He could identify him only when he was brought close to him, while he was standing in the dock as a witness. This clearly indicates that this witness suffers from very serious myopia. He claimed that he had seen the occurrence from a distance of 30-35 steps. The distance in feet comes to 70-80'. He had also supported the prosecution in its totality. As already discussed, it had not found favour with us on account of medical conflict as well as on account of certain improvements, which we have discussed in the preceding paragraphs. He had also tried to evade his relationship with Dulichand.

17. Apart from this, we also find that F.I.R. in this case could not have been transcribed and lodged at 7.00 A.M. It is a detailed written report. The inquest memo was prepared by I.O. immediately on his arrival. It was the first step undertaken by I.O. in the investigation. Nothing has been transcribed by I.O. in the inquest memo regarding the weapon of assault and cause of death. Apart from this, the medical evidence shows that there were no Lathi injuries, where in the inquest memo and Naksha Lash some contusion on the back were shown by I.O. The post-mortem staining will not occur in 3 1/2 or 4 hours. Moreover, if it really was there, the autopsy surgeon must have noticed it. Therefore, there was no question of any contusion present on the back. The doctor had noted down not only in the inquest memo but also in the Naksh Lash that he noticed no such injury. Presence of use of Lathi by three accused persons goes a long way to suggest that this was taken at the instance of I.O. by the informant (P.W.2). He does not appear to be the author of that F.I.R. Absence of Lathi injury on the deceased seriously affects the prosecution version not only but also the presence of these witnesses at the seat of occurrence.-

18. In the circumstances discussed above, we are of the opinion that appellant Balloo is entitled to benefit of doubt. His appeal is accordingly allowed. His

conviction and sentence, awarded by the learned II Addl. Sessions Judge, mathura, in S.T. No. 338 of 1979 under Section 302 I.P.C. are hereby set aside. He is on bail. He need not surrender. His bail bonds are cancelled and surety bonds are hereby discharged.

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