

islam and ors. Vs. the State

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Court : Allahabad

Decided On : Feb-17-2003

Reported in : 2003CriLJ2688

Judge : Vishnu Sahai and ;R.C. Pandey, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 300

Appeal No. : Criminal Appeal No. 767 of 1981

Appellant : islam and ors.

Respondent : The State

Advocate for Def. : Umesh Verma, APP.

Advocate for Pet/Ap. : Shiv Ram Tewari, ;J.K. Sinha, ;A.K. Vaish, ;S.C. Srivastava, ;Vivek Kumar Pandey,;Sachin Srivastava, ;Samir Kalia and ;J.N. Chaudhari, Advs.

Disposition : Appeal allowed

Judgement :

Vishnu Sahai, J.

1. Through this appeal Islam, Shafi alias Nadey, Jamil and Baur challenge the Judgment and order dated 22-10-1981 passed by sessions Judge, Bahraich in

Sessions Trial No. 95 of 1981, whereby they have been convicted and sentenced to undergo imprisonment for life for the offence punishable under Sections 302/34, I.P.C.

2. Shortly stated the prosecution case runs as under :--

The informant Kareem alias Bhallo P.W. 1, his father the deceased-Idu, his uncle Shakoor P.W. 2 and the four appellants, at the time of the incident, were residing in village Pandit Purwa hamlet of Chichri within the limits of police station Ikauna District Bahraich. At the said time Mumtaz P.W. 3 was residing in village Dafalipurva, which was also a hamlet of Chichri.

About six months prior to the incident, the appellants had impounded two mares of the informant in Ikauna cattle pond. The informant had paid Rs. 30/- and got them released therefrom. Ten days prior to the incident Usman Beg, the brother of the appellant-Islam had filed a case under Section 324, I.P.C. against him (the informant) and the deceased. The said case was pending at the time of the incident. On account of the aforesaid enmity Idu is alleged to have been murdered.

On 8-1-1981, the informant and his father Idu had gone to Ikauna market to get diesel oil. They did not get the same and their card was deposited at Ikauna. At about 5.00 p.m. on the said date, while they were returning to their village and had reached near the north of the field of Prem Nath Khosla, appellants-Islam, Shafi, Jameel and Baur, who were inter-related, came in front of them. Appellants-Islam and Shafi were armed with ballams, Jameel with a Gandasa and Baur with a lathi. Seeing the deceased and the informant, appellant-Islam shouted that they be killed and thereafter all the appellants belaboured Idu with their respective weapons. On the cries of the informant, Shakoor P.W. 2, Mumtaz P.W. 3, Shamsheer and Shyam Lal came. They also saw the appellants assaulting Idu. As a consequence of the assault Idu fell down and became unconscious. When the witnesses reprimanded the appellants, they ran away to the southern side in Arhar field. Thereafter, the informant went near his father and found that he was precariously injured and unconscious. Then the informant leaving his father Idu under the care of his uncle Shakoor and others went to the village and from there brought a bullock cart, on which he along with his father, his uncle Shakoor and

others proceeded to police station Ikauna. On the way the informant met Rashid. He got the F.I.R. of the incident scribed by him and thereafter lodged the same at police station Ikauna.

3. The evidence of Rama Kant P.W. 7 shows thus :-- On 8-1-1981 he was posted as Constable Moharrir at police station Ikauna, On the said date at 9.15 p.m., he registered the case on the basis of the written F.I.R. lodged by Kareem Bux alias Bhaloo vide G.D. entry Ext. Ka 15. Since Idu was precariously injured, he sent him for medical examination.

4. The evidence of the informant Kareem Bux alias Bhaloo shows that he accompanied his father to Primary Health Centre, Ikauna.

5. The evidence of Dr. Mahendra Singh P.W. 5 shows that on 8-1-1981 he was posted as medical officer at Primary Health Centre, Ikauna. On the said date, at 10 p.m., he medically examined Idu and found on his person 26 injuries, their break up being thus :-- five lacerated wounds, five incised wounds, four punctured wounds, one multiple contusion, nine reddish contusions and two abrasions. In the opinion of Dr. Mahendra Singh the incised wounds were attributable to a sharp edged weapon, punctured wounds to a sharp pointed weapon and the rest to a blunt weapon. He further opined that they were fresh i.e. about 1/4 days old.

The evidence of Dr. Mahendra Singh also shows that the same night (night of 8-1-1981) Idu succumbed to his injuries at 11.30 p.m.

6. The evidence of Head Moharrir Rama Kant P.W. 7 shows that on 8-1-1981 at 11.55 p.m. he received information that Idu had succumbed to his injuries and consequently converted the case from one under Section 307 to 302, I.P.C.

7. The autopsy on the corpse of Idu was conducted on 10-1-1981 at 10.30 a.m. by Dr. V. K. Chopra (P.W. 4) who found on it seventeen injuries, their break up being thus :-- ten lacerated wounds, two multiple contusions, three contusions, and two punctured wounds. In the opinion of Dr. Chopra the punctured wounds were attributable to a sharp pointed weapon and the remaining injuries to a blunt weapon. The cause of death spelt out in the post-mortem report was shock and

haemorrhage as a result of ante-mortem injuries.

8. The case was investigated in the usual manner by S.I. Srikrishna Mishra (P.W. 6). His evidence shows :-- After lodging of the F.I.R. he took over the investigation of the case. He saw Idu both at the police station and at the hospital. He reached the hospital at 10.00 p.m. and interrogated the informant Kareem Bux alias Bhalu. Thereafter, he went to the house of Idu, where at 1.00 a.m. he learnt that Idu had succumbed to his injuries in the hospital. In the morning, he prepared the inquest, photo lash and challan lash Exhibits Ka-5, Ka-6 and Ka-7 respectively. Thereafter he sent the corpse for autopsy. He then recorded the statements of the witnesses of inquest and prepared site plan Ext. Ka-9. On the place of incident, he found blood and recovered therefrom plain and blood stained earth in separate containers, under recovery memos. He then recorded the statements of Shakoor P.W. 2 and Shamsheer; and searched the appellants but could not find them. From the house of appellant-Shafi he recovered a lathi, on which it appeared there was some drops of blood. On 10-1-1981 he recorded the statement of Mumtaz P.W. 3. He also submitted a report for initiating proceedings under Sections 82/83, Cr. P.C. against the appellants, but in due course they surrendered in the Court. On 21-2-1981 he submitted the charge-sheet against the appellants.

9. The case was committed to the Court of Sessions in the usual manner, where the appellants were charged for the offence punishable under Sections 302/34, I.P.C. They pleaded not guilty to the charge and claimed to be tried. Their defence was of denial.

During trial in all the prosecution examined seven witnesses. Three of them namely the informant Kareem Bux alias Bhaloo, Shakoor and Mumtaz P.Ws. 1, 2 and 3 respectively were examined as eye-witnesses.

The suggestion given to these eye-witnesses during the course of their cross-examination was that the incident did not take place on 8-1-1981 at 5 p.m. (as alleged by the prosecution), but it took place at about 7 p.m. on the said date and they did not see the same. The eye-witnesses denied the said suggestion.

The learned trial Judge rejected the defence suggestion and believed the ocular account furnished by three eye-witnesses and convicted and sentenced the appellants in the manner stated in para 1.

Hence, this appeal.

10. We have heard Mr. Shiv Ram Tewari for the appellant, Mr. Umesh Verma, A.P.P. for the State of U.P. and Mr. J. N. Chaudhari for the complainant. We have also perused :- The depositions of the prosecution witnesses; the material exhibits tendered and proved by the prosecution; the statement of the appellants recorded under Section 313, Cr. P.C.; and the impugned judgment. We have no reservation in observing that this is a case wherein the appellants deserve to be acquitted.

11. We have seen that the learned trial Judge has founded the conviction of the appellants on the ocular account furnished by Kareem Bux alias Bhaloo, Shakoor and Mumtaz P.Ws. 1, 2 and 3 respectively. In our view, it would not be safe to accept it for the reasons stated hereinafter.

12. We begin with the ocular account furnished by Kareem Bux, son of the deceased. Since in para 2 of this judgment, we have set out the prosecution story on the basis of the recitals contained in his examination-in-chief and in that of Shakoor P.W. 2 and Mumtaz P.W. 3, we do not want to burden our judgment by reiterating all the details. In short his statement shows :- On 8-1-1981, he along with his father Idu had gone to Ikauna to get diesel. They did not get the same and left their card there. At about 5 p.m. while he and his father were returning and had reached to the north of the field of Prem Nath Khosla, the four appellants, out of whom Islam and Shaft were armed with Ballam, Jameel with a Gandasa and Baur with a lathi emerged. Seeing them. Islam shouted that they be killed and thereafter they belaboured his father Idu with their respective weapons. On his cries Shakoor P.W. 2, Mumtaz P.W. 3, Shyam Lal and Shamsheer came. When the witnesses reprimanded the appellants, they ran away. He thereafter went to the place where his father was lying and saw he was unconscious; went to the village; brought bullock cart; and on the same proceeded for police station Ikauna, getting his F.I.R. scribed on the way. On reaching the said police station he lodged his F.I.R.

13. We have gone through the statement of Kareem Bux and we are loathe to accept his claim of having seen the incident.

In the first place, we make no bones in observing that we are not inclined to believe him when he says that on the date of the incident he and his father had gone to Ikauna to purchase the diesel and when did not get it, they left their Card there (it is pertinent to mention that according to the prosecution while they were returning from Ikauna the incident took place). Our reason for reaching the said conclusion is that when during his cross-examination he was confronted with that portion of his statement under Section 161, Cr. P.C. wherein he had stated that he had left the Card for the purchase of diesel oil at home he replied that he had not made the said statement, The Investigating Officer during the course of his cross-examination has admitted that the informant had stated that he had left the Card at home. We are not prepared to believe the informant that the Investigating Officer by mistake has mentioned that he had left the Card at home. That apart, there are some other reasons as to why we entertain doubts about the story of the informant and the deceased having gone to purchase diesel. It is pertinent to mention that in his cross-examination, the informant has admitted that he did not know the name of the shop from where he had to purchase the diesel. He also admitted therein that he had to purchase 25 liters of diesel oil but he did not take any utensil for taking it. In our view, the story of purchasing diesel cannot be accepted and that being so the claim of the informant of having seen the incident as a logical imperative also cannot be accepted because according to the prosecution having failed to get the diesel when the informant and the deceased were returning, the incident took place.

14. There is another reason as to why we have grave doubt about the claim of the informant of having seen the incident and that is the inordinate delay in lodging of the F.I.R. It is pertinent to mention that the incident took place on 8-1-1981 at 5p.m. and the F.I.R. was lodged at 9.15 p.m. at police station Ikauna the said day. The G.D. entry pertaining to the registration of the case (Ext. Ka-15) shows that the distance between place of incident and the police station Ikauna was two miles. The evidence of the informant and the other witnesses shows that at the most half an hour after the incident, the informant went and got bullock cart from

his village and he returned with it within ten minutes and on the same he went along with his father Idu, who was precariously injured, and some others to police station Ikauna to lodge the F.I.R. Even if some margin is made in favour of the prosecution, it would be reasonable to infer that latest by 5.45 p.m. the informant proceeded for police station Ikauna. It is true that on the way he got his F.I.R. scribed. Bearing in mind the fact that the F.I.R. is brief one, in our view, at the maximum 45 minutes would have been taken in scribing it. In other words, the F.I.R. would have been scribed by 6.30 p.m. In such circumstances, the police station being only 2 miles away, in our view, the F.I.R. should have been lodged by 7.30 p.m.; at the most by 8.00 p.m.

As a matter of the fact we even have doubts that the distance between the place of incident and the police station Ikauna where the F.I.R. was lodged, was two miles. From the cross-examination of Shakoor P.W. 2 it emerges that from the place of incident, Ikauna was at a distance of one furlong and in five minutes from the place he was selling guava (he was selling them in Ikauna) he had reached the place of incident. He admitted that the police station Ikauna (where the F.I.R. was lodged) can be seen from the place where he was selling guava. If the statement of Shakoor is to be believed then the F.I.R. should have been lodged latest by about 7.00 p.m.

At any rate, there is no getting away from the fact that the F.I.R. is inordinately belated and in our view this delay lends great weight to the defence suggestion that the incident did not take place at the purported time but at about 7.00 p.m. and was not seen by the informant and the eye-witnesses.

15. When the aforesaid infirmities in the statement of the informant are borne in mind in the back drop of the fact that being the son of the deceased he is a highly interested witness and although at a distance of one furlong from the place of incident people were residing and no independent witness has come to support the incident, it becomes extremely unsafe to accept the informant's statement. In this connection we would like to advert to the cross-examination of the informant. He has stated therein that at a distance of about one furlong (in the eastern direction) from the place where his father was murdered, there is a road, which

goes from Ikauna to Bhinga and there are houses of Rahman, Rangrez, Sumeran, Soodnar also of some of other persons, the flour mill of Ram Bilas and some shops. In our view if the incident took place at 5.00 p.m. on 8-1-1981 i.e. in broad day light, bearing in mind the leisurely manner in which the deceased was beaten, which is manifest from the number of injuries which he sustained, there is no reason why no independent witnesses are not forthcoming to support the prosecution case.

16. For the aforesaid reasons we do not think it safe to place reliance on the testimony of Kareem Bux P.W. 1.

17. We now come to the evidence of Shakoor P.W. 2. In the first place it should be borne in mind that he is the real brother of the deceased Idu consequently interested witness; and therefore, his evidence has to be evaluated with caution. Secondly we cannot lose sight of the fact that his statement shows that on the date of the incident at 8 p.m. he had gone to sell 40 kgs. of guava and the unhappy co-incident is that when he had finished selling them and was on the way to his house, the incident took place. Thirdly there is an inordinate delay in the recording of his statement under Section 161, Cr. P.C. In his cross-examination he has admitted that after the lodging of the F.I.R. he remained at the police station for some time and at 9.45 p.m. reached the hospital and the whole night he along with the corpse was at the hospital. That being so, in our view, if the Investigating Officer at 10 p.m. could record the statement of the informant Kareem Bux at the hospital, there was no earthly reason why he did not record his statement under the said section. It is pertinent to mention that the evidence of the Investigating Officer S.I. Shrikrishna Misra P.W. 6 shows that he recorded the statement of Shakoor under Section 161, Cr. P.C. not on the date of the incident but the next after noon. In our view the delay in recording of Shakoor's statement under Section 161, Cr. P.C. shows that Shakoor had not seen the incident and in order to cook up a false ocular account the Investigating Officer was buying time.

In this connection, we feel it pertinent to advert to para 15 of the decision of the Apex Court rendered in the case of Ganesh Bhavan Patel v. State of Maharashtra, AIR 1970 SC 135 said paragraphs read thus :--

'15. As noted by the trial Court, one unusual feature which projects its shadow on the evidence of P.Ws. Welji, Pramila and Kuvarbai and casts a serious doubt about their being eye-witnesses of the occurrence, is the undue delay on the part of the Investigating Officer In recording their statements. Although these witnesses were or could be available for examination when the Investigating Officer visited the scene of occurrence or soon thereafter, their statements under Section 161, Cr. P.C. were recorded on the following day. Welji (P.W. 3) was examined at 8 a.m. Pramila at 9.15 or 9.30 a.m. and Kuvarbai at 1 p.m. Delay of a few hours, simpliciter in recording the statements of eye-witnesses may not by itself, amount to a serious infirmity in the prosecution case. But it may assume such a character if there are concomitant circumstances to suggest that the investigator was deliberately marking time with a view to decide about the shape to be given to the case and the eyewitnesses to be introduced. A catena of circumstances which lend such significance to this delay, exists in the instant case.'

18. In our view, for the said reasons, it would not be safe to accept the testimony of Shakoor.

19. We now come to the statement of Mumtaz P.W. 3. In the first place it should be borne in mind that like the other two witnesses he is also a highly interested witness. In his cross-examination, he admitted that last March he had purchased the fruits of the grove of Idu's son, Bhalu (informant) and his grove is still with him. To use his words 'Ida ke ladke bhaloo ke baagh ke phal mains khareide thei. Pichle phagun mein lee thi aur ab bhi merey pass hai.' Secondly he is a chance witness; a resident of Dafalipurwa, which is situated at the distance of 1/2 mile from the place of incident and the unhappy coincidence is that while he was returning from Ikauna market, where he had gone to purchase articles of daily use, he happened to reach just at the nick of time to see the incident. That apart, we find that there is an Inordinate delay in recording of his statement under Section 161, Cr. P.C. It is significant to mention that the incident took place on 8-1-1981 and the Investigating Officer has admitted in his examination-In-chief that he recorded his statement under Section 161, Cr. P.C. on 10-1-1981. It is significant to mention that the Investigating Officer has given no reason for the delay in his interrogation under Section 161. Cr.P.C.

In our view, since the statement under the said section is to be recorded with utmost promptitude because promptitude substantially eliminates the possibility of a trumped up account creeping therein, it was incumbent on the part of the Investigating Officer to have furnished the reason as to why there was an inordinate delay in his recording of the said statement.

20. For the said reasons, in our view, it would not be safe to accept the testimony of Mumtaaz P.W. 3 also.

21. We are also doubtful whether the deceased was belaboured by the appellant-Jameel with Gandasa as alleged by the prosecution. We feel it pertinent to mention that the evidence of the Informant is categorically to the effect that Gandasa blows were inflicted by Jameel on the person of the deceased. However, we have seen that although Dr. Mahendra Singh P.W. 5, who examined the deceased in his life time, found live incised wounds on his person but Dr. V.K. Chopra P.W. 4, who performed the autopsy on the person of the deceased, did not find any incised wound on the corpse of the deceased.

22. Learned Addl. Public Prosecutor strenuously urged that since the Investigating Officer found blood on the place of incident, the place of incident has been fixed and since defence has not been able to create doubt in respect of it, the ocular account furnished by the eye-witnesses pertaining to it becomes acceptable. We regret that we do not find any merit in the said submission. It is true that the Investigating Officer has stated that he found blood stained earth which he took into possession, but there is no report of the chemical analyst to show that blood therein was human or hot. From the statement of the Investigating Officer it is not clear whether the blood stained earth was sent to chemical analyst or not. In our view, in both the situations the prosecution is the loser; in the former because there was no reason for not sending it; in the latter because there was no reason for it for not producing the said report in the trial Court.

23. It should be borne in mind that enmity is a double edged weapon. When the ocular account is credit worthy, Courts take it as a motive and a ground for sustaining the conviction but when it is not, as is the case here. Courts take it as a reason for false implication of the accused. In the instant case, we have set out the

enmity in para 2 and wish to point out that although the main enmity was with appellant-Islam, but since the informant has admitted that other appellants were his relations the possibility of their being falsely implicated along with Islam cannot be ruled out.

24. For the said reasons, we allow this appeal; acquit the appellants for the offence punishable under Sections 302/34, I.P.C.; set aside their convictions and sentences thereunder, direct that they need not surrender to their bail; and their bail bonds shall stand cancelled and sureties discharged.

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