

Wazibullah and ors. Vs. State of U.P.

Wazibullah and ors. Vs. State of U.P.

SooperKanoon Citation : sooperkanoon.com/489773

Court : Allahabad

Decided On : Jul-16-2004

Reported in : 2005CriLJ1004

Judge : M.C. Jain and ;K.K. Misra, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 395, 396 and 397; Code of Criminal Procedure (CrPC) - Sections 161 and 313

Appeal No. : Respondent. Cri. Appeal No. 2128 of 1980

Appellant : Wazibullah and ors.

Respondent : State of U.P.

Advocate for Def. : A.K. Bhatt, A.G.A.

Advocate for Pet/Ap. : P.P. Srivastava, ;S.N. Tripathi and ;Apul Mishra, Advs.

Disposition : Appeal dismissed

Judgement :

M.C. Jain, J.

1. This appeal was filed by three appellants, namely, (1) Wazibullah, (ii) Santraj and (iii) Mangar against judgment and order dated 22-9-1980 passed by Sri D. P. Srivastava, the then V Additional Sessions Judge, Gorakhpur in Sessions Trial

Nos. 149 and 169 of 1979. Wazibullah and Santraj were tried in Sessions Trial No. 149 of 1979 whereas Mangar was tried in Sessions Trial No. 169 of 1979. Sessions Trial No. 149 of 1979 was treated as the leading case and both the sessions trials were decided by a common judgment. The three accused appellants were convicted under Section 396, IPC and sentenced to life imprisonment. Out of them, Wazibullah and Mangar died during the pendency of the appeal and the same abated respecting them by order dated 13-2-2003.

2. The Court is presently concerned only with the appellant Santraj. His bail was cancelled on 9-4-1998, but he came to be arrested long after when the non-bailable warrant was again directed to be issued against him on 9-1-2003. Presently he is in Jail. Sri Apul Mishra has been appointed as Amicus Curiae to argue out the appeal for him.

3. We have heard Sri Apul Mishra, learned Amicus Curiae for the appellant and Sri A. K. Bhatt, learned A.G.A. from the side of the State. The record has also been perused by us.

4. The facts lie within a short compass. Jagarnath Dubey deceased was resident of village Domingarh, P.S. Chilwatal, District Gorakhpur. He was a money lender. On 1-4-1979 he was returning from City Gorakhpur to his village via Mohalla Ilahibagh after realising dues from his debtors. At about 8.30 p.m. when he happened to arrive near the culvert situated in Mohalla Bahrapur within P.S. Rajghat, Gorakhpur, he noticed that five persons were sitting on the culvert. One of them fired from his country made pistol on him when he happened to reach near the culvert. It, however, did not hit him. Then he (Jagarnath Dubey) flashed his torch and identified the miscreants Ratan Kewat, Mangar Ghosi, Santraj Kewat, Wazibullah and one unknown person. Then all the said four accused along with their unknown companion pounced upon Jagarnath Dubey and started grappling with him. He raised alarm attracting the witnesses Awadh Kishore Tripathi P.W. 1, Ram Prasad Pandey, Mithai Lal P.W. 2 and Subhash Mani Tripathi. Meanwhile, the accused appellant Santraj fired from his countrymade pistol as a result of which Jagarnath Dubey received firearm injury and thereafter the accused snatched his licenced single barrel gun, six live cartridges, a wrist watch and a bag

containing Rupees 100/- as also two blouses. The witnesses unsuccessfully chased the accused.

5. The report of the incident was written by Awadh Kishore Tripathi P.W. 1 at the dictation of Jagarnath Dubey. Awadh Kishore Tripathi P.W. 1 lodged the same at the P.S. Rajghat on 1-4-1979 at 23.30 hours. A case was registered under Section 395/397, IPC on 10-4-1979, Jagarnath Dubey succumbed to his injury in AIIMS, New Delhi. The case was then converted under Section 396, IPC.

6. The investigation was conducted by S.I. Parmanand Dubey P.W. 7. He recorded the statement of Awadh Kishore Tripathi P.W. 1 on 1-4-1979. On 2-4-1979, he went to District Hospital, Gorakhpur and recorded the statement of Jagarnath Dubey who also owned the contents of the FIR. It was also stated by him, that the accused appellant Santraj had injured him by firing and that he was accompanied by Ratan Kewat, Mangar Ghosi, Wazibullah and one unknown person. The statements of the other witnesses were also recorded by the Investigating Officer. The place of incident was visited by him and the site plan prepared. It may also be related here that the genuineness of the post-mortem report of the deceased was admitted by the defence side. The autopsy was conducted on 11-4-1979 at 3.30 p.m. at AIIMS, New Delhi. The deceased was aged about 33 years. The fatal injury had been caused by firearm which was on right side of chest. There was an abrasion on left cheek and a lacerated wound on right parietal region which could be produced by blunt force.

7. The defence was of denial and of false implication.

8. The prosecution in all examined seven witnesses in the case. The material witnesses, so far as the accused appellant Santraj is concerned, were Awadh Kishore Tripathi P.W. 1 and Mithai Lal P.W. 2.

9. The argument of the learned Amicus Curiae is that the so-called eye-witnesses are not at all believable and that reliance could also not be placed on the so-called dying declaration of the deceased. He also urged that the FIR or the statement of the victim purportedly recorded by the Investigating Officer under Section 161, Cr. P.C. could not be treated as his dying declaration, there being no reason for not

recording his dying declaration by a Magistrate despite his death having occurred long after the incident in AIIMS, New Delhi on 10-4-1979. In the succeeding discussion, we intend to examine the worth of these submissions in the light of material and medical evidence on record.

10. We have carefully examined the testimony of the two eye-witnesses, namely, Awadh Kishore Tripathi P.W. 1 and Mithai Lal P.W. 2. Awadh Kishore Tripathi P.W. 1 is the person who had scribed the FIR also at the dictation of the victim in the hospital where he had been removed from the scene of occurrence immediately after the incident. He well explained that though he was actual resident of village Sankhdar, P.S. Khanji, but in connection with his study in Dhanwantari Ayurvedic Mahavidalaya Kuraghat, he had taken a room on rent at Domingarh. The Ayurvedic College was situated at a distance of 2-21/2 Kos from Domingarh, 1-4-1979 was declared a holiday and on that day at about 5-30 p.m. he left Domingarh and came to City Gorakhpur just for a joy visit. It was at about 7-30 p.m. or 7.45 p.m. that he started his back journey from Gorakhpur City to Domingarh on foot. Mithai Lal P.W. 2 and Ram Prasad Pandey were also with him. When he arrived near Baharampur culvert, he heard the sound of firing from the west. He and Mithai Lal P.W. 2 advanced forward. Mithai Lal flashed his torch and after advancing 10-15 paces, he noticed five miscreants grappling with Jagarnath Dubey. Out of them, he identified four including the accused appellant Santraj. It is also there in his testimony that he saw Santraj firing at Jagarnath Dubey from his country made pistol as a result of which he sustained injury and fell down on the ground. The miscreants then snatched his wrist watch, single barrel gun and bag and ran away with the looted articles. He also specifically stated that it was a moonlit night and he knew Jagarnath Dubey as well as Santraj for about 11/2 years before the incident. He denied that Jagarnath Dubey was his Bua's son. It was then suggested in his cross-examination that Jagarnath Dubey was his father's Bua's son. He refuted this suggestion too. It was obvious that the defence was groping in the dark and was simply fishing in an attempt to search ground to assail the testimony of this witness. The witness was a young man of about 24 years of age and there was nothing unnatural if on a holiday he thought to go to the city of Gorakhpur in the evening for a joy visit from Domingarh where he had taken a room for rent while studying in Ayurvedic College. Kuraghat. It was also

not unnatural that he was living in Domingarh at a distance for about 2-21/2 Kos (about 4-5 miles) from his college. It is common knowledge that there is shortage of accommodation in big cities. It is not easy for a bachelor student to get accommodation in city at reasonable rent to pursue his studies. So, he thought it convenient to live in the village near the city, particularly when he intended to settle down in Domingarh to establish his practice there, after completion of his study, as he stated before the Court. The witness had taken the victim to the hospital soon after the incident which further made his presence on the spot quite probable. The FIR, as stated earlier, was scribed by him in the hospital at the dictation of the victim and he lodged the same too at the police station the same night at 11.30 p.m. Even the Investigating Officer recorded his statement that very night. The accused appellant Santraj was known to him from before. He had seen him participating in the crime from close range in the torch light flashed by Mithai Lal P.W. 2 in a moonlit night. Nothing could be elicited from his cross-examination. Neither he was thick with the deceased or had any animus against the accused appellant Santraj to implicate him falsely. There is nothing to castigate his testimony delivered against the accused appellant Santraj as one of the participants of this crime.

11. So is the position of Mithai Lal P.W. 2, another eye-witness. He was resident of village Domingarh itself. To explain his presence at the spot, he stated that on that day, he was working with a mason constructing a house of one Noor Mohammad in Mohalla Illahibagh, Gorakhpur. Due to the placing of the lintel that day, he was a bit late to return to his village. While he was returning to his village at about 7.30 p.m. or 7.45 p.m. followed by Ram Prasad and Awadh Kishore Tripathi, he heard the sound of firing near the culvert in Mohalla Bahrampur. He flashed his torch and advanced forward, noticing that four or five persons were grappling with Jagarnath Dubey. The accused appellant Santraj was one of them and during the course of grappling, the accused appellant Santraj opened fire on Jagarnath Dubey from his countrymade pistol, causing injury to him. The culprits then ran away snatching bag and gun from Jagarnath Dubey. He specifically stated that he knew Santraj since his childhood. This witness also had no motive to depose falsely to implicate the accused appellant Santraj. He was not related either to the victim. To say shortly, there was no ground to discredit him who withstood the cross-examination

firmly.

12. A dent was sought to be made in his testimony with the help of the statement of Noor Mohammad D.W. 1 who came to say that his house was at a distance of about 25 paces in Illahibagh, Gorakhpur and that the same belonged to Nagarpalika Gorakhpur. He was residing in it for about last 12 years. He denied about its construction and laying of any lintel. He further denied any acquaintance with Mithai Lal P.W. 2. In cross-examination, however, he admitted that Illahibagh was a big mohalla and he was not aware whether any other person of his name lived there or not. He did not file any rent receipt of his house in support of his statement. The trial Court was perfectly justified in concluding that the statement of this witness did not inspire confidence. We are also of the opinion that the defence simply picked up this man at random in the hope of scoring a point in assailing the testimony of Mithai Lal P.W. 2.

13. We should also allude to another aspect of the matter that though the co-accused Wajibullah claimed identification at the trial, nothing of the kind was done by the present accused appellant Santraj. It demolishes this argument of the learned Amicus Curiae that the witnesses Awadh Kishore Tripathi P. W. 1 and Mithai Lal P.W. 2 did not know him from before. The accused appellant Santraj did not say so in his statement either under Section 313, Cr. P.C. Our conclusion is that the criticism of the eye-witnesses Awadh Kishore Tripathi P.W. 1 and Mithai Lal P.W. 2 is wholly without any foundation. Both of them are trustworthy to the effect that the accused appellant Santraj was one of the participants of this crime.

14. We should also point out that the place of incident is fixed by the testimony of Lal Chand, Chaukidar D.W. 2 also who stated that there were 5-6 pumping sets near Domingarh dam and to guard them there were Chaukidars around the clock. According to him also, there was a culvert on the dam adjacent to which the pumping sets were there and the Chaukidar used to live near the pumping sets. He admitted that a person was injured near the culvert. He had heard the sound of firing. But as he was taking food at that time, he did not reach the spot immediately. After 1-11/2 hours of hearing the sound of firing, when he went to the culvert he did not notice anybody there. However, soon after the sound of firing he

had heard the voices of some people. He scented the presence of several persons. So, the place of incident could not be doubted at all even as per his evidence. The Investigating Officer, Parmanand Dubey, S.I. P.W. 7 had inspected the spot at the instance of Mithai Lal P.W. 2 and Subhash Mani. He had also taken blood stained and simple earth from the scene of occurrence.

15. There is yet another aspect of the matter. The Investigating Officer had found the licence number of the gun of Jagarnath Dubey from the register maintained in the local Collectorate. The number of the gun was 64333. Shyam Singh P.W. 5 was the Station Officer of P.S. Pipraich on 8-6-1979. On that day an encounter had taken place with some miscreants in which Ratan Kewat and Ram Asrey were killed. It would be recalled that Ratan Kewat was one of the named accused in this crime. It is also there in the testimony of this witness that from the possession of Ratan Kewat a single barrel gun No. 64333 had been recovered. We also note that Awadh Kishore Tripathi P.W. 1 specifically stated that the gun of Jagarnath had been snatched at the spot by Ratan Kewat, one of the participants of the crime whom also he knew from before. Thus, the recovery of gun of Jagarnath Dubey victim from Ratan Kewat co-accused (who was killed in encounter of 8-6-1979) is a link supporting the prosecution story detailed in the earliest version of the FIR and proved through evidence in the Court.

16. Learned Amicus Curiae for the accused appellant argued that Shiv Shankar Dubey P.W. 4 (brother of Jagarnath Dubey) was also examined but he did not say that he had been informed by his brother Jagarnath Dubey that the accused appellant Santraj was one of the participants of this crime. It is not possible to attach any importance to this argument. It is pertinent to state that Shiv Shankar Dubey P.W. 4 was not an eye-witness. He was not present at the spot. He had reached the hospital subsequent to the incident after about midnight. One of the cardinal principles of law of evidence is that the hearsay evidence is not to be admitted, barring certain exceptions recognised by the Indian Evidence Act, 1872. Even if this witness had stated to have been informed by his brother Jagarnath Dubey about the participation of the present accused appellant Santraj in the crime, that would have simply been hearsay evidence and could not be admissible. We, therefore, reject this argument.

17. This is case where there is not only the trustworthy evidence of two eye-witnesses about the participation of the accused appellant Santraj in this crime, but there is dying declaration of the deceased also in the form of the FIR which was scribed by Awadh Kishore Tripathi P.W. 1 at his dictation. It was ratified by him (Jagarnath Dubey) in his statement to the Investigating Officer made under Section 161, Cr. P.C. The Investigating Officer had visited him in the hospital on 2-4-1979 and had then recorded his statement. The FIR dictated by the victim Jagarnath Dubey has all the attributes of his dying declaration. The general principle on which such evidence is admitted is that this is a declaration made in extreme circumstances. A dying declaration stands on the same footing as another piece of evidence. It was the earliest statement made by him when he had been removed from the spot to the hospital by an unconcerned person -- Awadh Kishore Tripathi P.W. 1. The FIR was dictated by him to Awadh Kishore Tripathi P.W. 1 at the earliest opportunity when the possibility of tutoring was wholly out of question. There is no circumstance to infer that his speech or mental faculty had been impaired. The incident took place on 1-4-1979 and he died on 10-4-1979 at AIIMS, New Delhi. The Investigating Officer Parmanand Dubey P.W. 7 testified that he recorded the statement of the injured Jagarnath Dubey in District Hospital, Gorakhpur on 2-4-1979. The Investigating Officer proved the facts stated by him. Jagarnath Dubey admitted his thumb mark on the FIR including its contents that the accused appellant Santraj had injured him by firing from his country made pistol. In fact, the statement of the injured recorded by the Investigating Officer also falls in the category of dying declaration which is wholly consistent with the contents of the FIR. The Investigating Officer had also examined three cell jeep torch of Jagarnath Dubey as also the torch of the witness Mithai Lal P.W. 2. It was quite usual that while returning from the city of Gorakhpur after making recovery from his debtors, Jagarnath Dubey was carrying a torch which he had flashed at the time of the incident when the first shot had been fired by one of the miscreants which had not hit him. Jagarnath Dubey himself did not have any previous enmity with the accused appellant Santraj and could have no motive to falsely implicate him as one of the participants of this crime. The dying declaration of the deceased is capable of being believed as the truthful version of the incident as to the circumstances of his death at the hands of his assailant (the present accused

appellant Santraj). It is consistent and has been corroborated also by the testimony of the eyewitnesses.

18. The last argument of the learned counsel for the accused appellant is that though the victim remained alive for about ten days, but his regular dying declaration was not recorded by the Magistrate. The surrounding circumstances have to be taken note of that the incident took place at about 8.30 p.m. on 1-4-1979 and from the spot the victim was removed to the hospital by an unconcerned person Awadh Kishore Tripathi P.W. 1. Shiv Shankar Dubey P.W. 4 brother of the victim could reach the hospital after about mid-night. The victim was struggling between life and death. The whole attention was focussed in saving his life. On 2-4-1979, Shiv Shankar Dubey P.W. 4 took him for treatment to Medical College, Gorakhpur and on 3-4-1979 he took him to Railway Hospital, Gorakhpur from the Medical College. On 7-4-1979, he took him to Delhi and got him admitted there in AIIMS. The FIR dictated by the victim himself to Awadh Kishore Tripathi P.W. 1 immediately on being rushed to the hospital in the night of 1-4-1979 had already been lodged by him (Awadh Kishore Tripathi P.W. 1) at the police station at 11.30 p.m. The Investigating Officer, too, had recorded the statement of the victim in the hospital on 2-4-1979. Under these circumstances, when the entire attention was on the point of saving the life of the victim, the non-recording of dying declaration by the Magistrate stands well explained and no adverse inference can be drawn against the prosecution case on this score.

19. At the risk of repetition, we say that the participation of the accused appellant Santraj in the commission of this crime is proved by the testimony of two independent eye-witnesses. Awadh Kishore Tripathi P.W. 1 and Mithai Lal P.W. 2 as also by his own dying declaration. To say in other words, the dying declaration of the deceased is consistently corroborated by the testimony of two confidence inspiring eye-witnesses. The case, therefore, stands on a better footing than simply being based on dying declaration.

20. Not finding any merit in this appeal, we hereby dismissed it. The conviction of the surviving accused appellant Santraj under Section 396, IPC with sentence of life imprisonment is maintained. The appeal has already abated in respect of the

appellants Wajibullah and Manger. The accused appellant Santraj is reported to be in jail in compliance of the non-bailable warrant issued against him during pendency of the appeal on 9-1-2003.

21. Sri Apul Misra, learned Amicus Curiae, who has argued out the appeal for the accused appellant, shall get Rs. 1000/- as his fee.

22. The Chief Judicial Magistrate, Gorakhpur shall confirm that the accused appellant Santraj is actually lodged in jail and shall do the needful in compliance of the dismissal of this appeal under intimation to this Court within two months from the date of receipt of copy of the judgment.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com