

Arvind Kumar and Etc. Vs. State of U.P.

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Court : Allahabad

Decided On : Mar-01-2002

Reported in : 2002CriLJ2898

Judge : J.C. Gupta and ;Imtiyaz Murtaza, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 302 and 307; Code of Criminal Procedure (CrPC) - Sections 173

Appeal No. : Crl. Appeal Nos. 482 and 518 of 1981

Appellant : Arvind Kumar and Etc.

Respondent : State of U.P.

Advocate for Def. : Dy. G.A., ;R. Dwivedl, ;Ashish Gopal and ;Ram Swaroop Tewari, Advs.

Advocate for Pet/Ap. : K.K. Srivastava, ;Yashpal Chaturvedi and ;S.S. Tewari, Advs.

Judgement :

J.C. Gupta, J.

1. Criminal Appeal No. 482 of 1981 has been filed by Arvind while Criminal Appeal No. 518 of 1981 is by accused Anil alias Pappu.

2. Both of them have been convicted under Section 302 I.P.C. and sentenced to imprisonment for life by the then Vth Addl. Sessions Judge, Etawah in Sessions Trial No. 241 of 1980 by the judgment dated 25-2-1981.

3. The prosecution case, as was set up in the F.I.R. lodged by Anil Prakash Shukla, P.W. 1, in short, was that about one and half years prior to the occurrence in question Atul Prakash Shukla, brother of first informant was beaten by accused Arvind Shukla and despite having assaulted him, accused Arvind tried to implicate Atul Prakash in a false case but could not succeed. Since then Atul Prakash Shukla and Arvind were on inimical terms. It was further alleged that on 21-10-1979 first informant Anil Prakash Shukla and his brother Atul, deceased of this case, were going to their residential house after taking a round in the market and when they were in front of the house of Shyam Babu Sharrna in Mohalla Gumti Qasba Auraiya accused Arvind, Anil alias Pappu and Virendra Dubey suddenly appeared there. They cried that Atul be killed, whereupon accused Arvind gave one knife blow on Atul. He ran crying and fell down on the Chabutra of Shyam Babu Sharma. Besides the first informant, the incident was witnessed by Dinesh Shukla, Ramesh Kumar Tripathi and Laljee Chaurasiya and accused persons were identified in electric light. Accused persons ran away when challenged. Anil Prakash along with the witnesses came on the Chabutra where Atul was lying injured. He sent Laljee Chaurasiya to call his father who immediately arrived there and asked Anil Prakash Shukla to lodge the report. He also carried Atul to police station in a rickshaw leaving Anil Prakash P.W. 1 on the spot, Anil Prakash scribed the report Ex. Ka 1 and lodged the same at police station Auraiya at 8.10 p.m. Police station was situated only at a distance of about 3 furlongs from the place of occurrence. On the written report of Anil Prakash Shukla, case under Section 307 I.P.C. was registered against Arvind Shukla, Virendra Dubey and Anil alias Pappu in the general diary at Sl. No. 36, which also indicates that injured Atul had reached at the police station along with first informant Anil Parakeet Shukla. Injured Atul was sent to Hallet Hospital, Kanpur with constable 536 Ram Prakash who also carried with him the chithi majroomi. On account of strike Atul could not be admitted in Hallet Hospital, therefore, he was taken to Ursula Hospital Kanpur. Atul's father, P.W. 2 Ram Sewak Shukla accompanied Atul when he was taken to Kanpur in a Bus.

4. P.W. 6 Dr. S.M. Sharma of Ursula Hospital, examined the injuries of Atul at 11 p.m. on 21-10-1979 and found following injuries:--

1. Incised wound 3 cm. x 1/2 cm. x bone deep on left side of scalp, 7cm. above left ear;

2. Incised wound 2 1/2 cm x 2cm x 1 1/2 cm, on the front of left shoulder joint;

3. Incised wound 3 cm x 1 1/2 cm x abdominal cavity deep on right side of abdomen about 7 cm above umbilicus. X-ray was advised.

4. Incised wound 4 cm x 2 1/2 cm x 2 cm on medial aspect of front of left forearm above, 5 cm below left elbow.

5. Incised wound 4 1/2 cm x 2 1/2 cm x 2 cm., about 1 cm below in medial of injury No. 4.

5. General condition of the patient was low though he was conscious. In the opinion of doctor injuries No. 1,2,4 and 5 were simple while injury No. 3 was kept under observation. Information was also sent to Kotwali police for getting dying declaration of the deceased recorded by a Magistrate. Accordingly dying declaration of Atul was recorded in the same night at 1.30 a.m. At this juncture it may be relevant to point out that prosecution did not rely upon the said dying declaration on the ground that it was tainted and tutored and for that reason neither the Magistrate was cited as a witness in the charge sheet nor copy of this dying declaration was furnished to the accused persons under Section 173 Cr.P.C.

6. After registration of case at police station Auraiya S.I. Mohd. Ismail P.W. 5 started investigation. He recorded the statement of first informant Anil Prakash and then proceeded for the scene of occurrence. On reaching there he prepared site plan Ex. Ka 9 and took into possession blood stained and plain floor pieces from the cemented Chabutra of Shyam Babu Sharma where Atul was said to have fallen down after receiving injuries. The investigating officer then interrogated other witnesses.

7. On 9-11-1979 the investigating officer reached Ursala Hospital, Kanpur and recorded the statement Ex. Ka 11 of injured Atul who was then admitted in the Hospital as an in-door patient. Atul ultimately succumbed to his injuries on 14-11-1979 at 11.30 a.m. in Ursala Hospital. Information of his death was communicated to police station Kotwali,, Kanpur as the aforesaid hospital was situated within the territorial jurisdiction of that police station. S.I. Jang Bahadur Singh, P.W. 4 went to Ursala Hospital and held inquest. Dead body was then sent to mortuary for post mortem examination.

8. Dr. Jitendra Singh, P.W. 3 conducted autopsy on 15-11-1979 at 11.30 a.m. and found following ante mortem injuries:

1. One healed wound 3 cm x 1.5 cm on the front of left shoulder.
2. One stitched wound 2 cm with two stitches, on the front of the left shoulder 5 cm, below injury No. 1.
3. One stitched wound 3 cm long with four stitches on the front of the left upper arm 11 cm, above left elbow
4. One stitched wound 3 cm long with 3 stitches on the front of the left upper arm 4 cm above left elbow
5. One healed wound 6 cm x 1.5 cm, on the front of left fore arm, 2 cm below the left elbow.
6. One healed wound 2.5 cm x 0.5 cm on the left side of the head, 7 cm, above left ear.
7. One septic wound 14 cm x 5 cm x cavity deep on the right side of abdomen, 1.5 cm from the mid line
8. Septic wound 2.5 cm x 1 cm x cavity deep with a drainage tube on the right side of the abdomen, 5 cm, right to injury No. 7.
9. One healed abrasion 3 cm x 0.5 cm on the front of the right leg, 12 cm below knee joint.

10. One surgical cut open wound on the medial side of left malleolus

11. One surgical cut open wound on the medial side on right medial malleolus.

9. Post mortem report is Ex. Ka 2. In the opinion of the doctor death was due to shock and septicaemia as a result of injury No. 7. In his deposition before the trial Court Dr. Singh has categorically stated that injury No. 7 was itself sufficient to cause death in ordinary course of nature. On completion of investigation all the three accused persons were challaned through charge sheet Ex. Ka 13.

10. In support of its case prosecution produced six witnesses in all before the trial Court, they were P.W. 1 Anil Prakash Shukla, the sole eye witness, P.W. 2, Ram Sewak Shukla, father of deceased Atul, P.W. 3 Dr. Jitendra Singh, who conducted autopsy, P.W. 4, S.I. Jang Bahadur Singh who held inquest proceedings, P.W. 5 Mohd. Ismail, the investigating officer and P.W. 6 Dr. S.M. Sharma who initially medically examined Atul in Ursula Hospital Kanpur on 21-10-1979 at 11 p.m. He also proved his signature on the dying declaration [Ex. Kha 1] of deceased Atul recorded by the Magistrate.

11. Accused persons denied the prosecution allegations and stated of their false implication due to enmity.

12. Learned trial Judge held that the presence of Anil Prakash Shukla, P.W. 1 at the time of occurrence was highly doubtful but the first information report lodged by him could not be ignored as whatever he came to know of the occurrence he narrated the same in the F.I.R. The learned trial judge has also rejected the statement of Atul Prakash Shukla Ex. Ka-11 recorded by the investigating officer at Ursula Hospital as his dying declaration. However, the learned Sessions Judge placing total reliance on Ex. Kha 1, the dying declaration of deceased Atul recorded by Magistrate, has found the appellants Arvind and Anil alias Pappu guilty of the offence of murder and accordingly convicted and sentenced them to life imprisonment under Section 302 I.P.C. Accused Virendra Kumar Dubey has, however, been given benefit of doubt and acquitted.

13. At the outset we may state that as far as appeal filed by Anil alias Pappu is concerned, as per the report of C.J.M. Etawah dated 5-10-2000 the said appellant has died long back, therefore, his appeal stands abated.

14. We have heard Shri G.S. Chaturvedi, Sr. Advocate for the appellants, Shri M.C. Joshi, learned A.G.A. for the State, and Dr. R. Dwivedi along with Shri R.S. Tiwari for the complainant.

15. The factum of death of Atul Prakash on account of ante mortem injuries has neither been assailed nor disputed before us by the learned counsel for the appellants. Dr. Jitendra Singh P.W. 3 has stated in his statement before the Court that cause of death of Atul Prakash was septicaemia as a result of injury No. 7. This injury was in abdomen and corresponded to injury No. 3 of the injury report Ex. Ka 14 which was prepared by Dr. S.M. Sharma when he initially medically examined Atul Prakash on the night of occurrence at 11 p.m. This injury was an incised wound 3 cm x 1 1/2 cm abdominal cavity deep. Dr. Singh in his statement before the trial Court has categorically stated that injury No. 7 was in itself sufficient to cause death in ordinary course of nature. The mere fact that the victim Atul Prakash died on 14-11-1979 in Ursala Hospital i.e. after about 24 days of the incident and due to septicaemia will not be sufficient to take the case out of the purview of the offence of murder as long as it is shown that injury found on the deceased was sufficient to cause death in ordinary course of nature. In this regard we may refer to an Apex Court decision in Jagtar Singh v. State of Punjab (1998) 7 J.T. (SC) 454, (AIR 1999 SC 75) It is thus established that Atul Prakash died a homicidal death on 14-11-1979 on account of injuries sustained by him in the night of 21-10-1979.

16. The moot question for consideration, however, is whether from the evidence and material on record has it been proved beyond reasonable doubt that it was the appellant who along with co-accused Atul had caused injuries to Atul Prakash in the manner as alleged by the prosecution?

17. It was submitted by learned counsel for the appellant that the prosecution produced only one eye witness namely, Anil Prakash Shukla, P.W. 1 but his testimony has been discarded by the trial Court itself. The learned Sessions Judge

has based conviction of the appellant on the basis of defence document marked as Ex. Kha-1 the statement of the deceased Atul Prakash which was recorded by Magistrate at Ursula Hospital, Kanpur. It was contended by learned counsel for the appellant that the said document was neither proved in accordance with law nor was even relied upon by the prosecution and, therefore, the learned Sessions Judge committed a gross error in convicting the appellant, without there being any evidence against him.

18. P.W. 1 Anil Prakash Shukla is the sole eye witness examined before the trial Court as no other witness as was named in the first information report was produced in Court. Anil Prakash Shukla is undoubtedly real brother of deceased Atul Prakash. As per his statement he claimed that he was present with his brother Atul Prakash when the latter was assaulted by accused persons. The trial Court has discarded his evidence doubting his presence at the scene of occurrence, yet curiously enough the learned trial Judge has given undue weight to the first information report simply for the reason that the FIR was promptly lodged. The trial Court's finding is as under: -

In this view of the matter I hold that the presence of Anil Prakash (P.W.I) on the scene of occurrence is doubtful. However, the statement of this witness as a first informant is material. He had lodged report Ext. Ka 1 of the occurrence just within 40 minutes and as such his statement on that point is relevant and material on the question of proving that what he came to know immediate after the occurrence, he mentioned it in the F.I.R. Ext. Ka 1 and there is nothing on record to show that the F.I.R. is a document which was lodged after due deliberations and consultation.

19. We find that the approach of the learned Sessions Judge in reposing confidence in the first information report was highly erroneous because he himself had come to the conclusion that presence of first informant at the scene of occurrence was doubtful and the contents of the same were based upon information supplied to the first informant by others. The F.I.R. is not a substantive piece of evidence and it could be used only to corroborate or contradict its maker. If the maker had narrated facts which came to his knowledge from other person or persons unless those persons are examined as eye witnesses, no weight could be

attached to the F.I.R. containing knowledge derived from others.

20. Be that as it may, since entire record of the case is before us, we have to examine the evidence of P.W. 1 to find out whether his testimony is capable of being accepted as true. On minute analysis of the statement of P.W. 1 we find that it is highly risky to accept his claim that, he was accompanying the deceased and had witnessed the incident wherein Atul Prakash was assaulted. Anil Prakash was not a natural witness as per his own showing. He is elder brother of deceased and was having animosity against the appellant Arvind Kumar. He admitted that the accused Arvind had assaulted his brother on a previous occasion and yet had lodged an F.I.R. against his brother. He further admitted that although nothing was done against his brother on the said report yet he was annoyed with the appellant. He further admitted that from before the incident he had apprehension that accused might assault his brother. It was rightly argued by the learned counsel for the appellant that with this mental background, this witness could easily suspect that the assault upon Atul might have been made by the accused. It is further pointed out that his presence at the scene of occurrence was by a sheer chance. In his statement before the Court this witness has admitted that on the day of occurrence he and Atul had left their home at different point of time and he had not accompanied the deceased nor any programme was prefixed regarding the time of his coming back. He himself in clear words admitted that by a sheer co-incidence the deceased met him in front of the shop of doctor Ram Babu Bajpai. He has stated that when he was returning home he stopped in front of the shop of Ram Babu doctor and was talking to his friend whose name he did not remember when suddenly Atul and his friend Shailesh reached there. His house was undoubtedly situated at a far distance from the place of occurrence. It is thus clear that apart from the fact that the witness was partisan, his presence at the scene of occurrence was by a sheer chance. The witness in his statement before the Court stated that when he and his brother Atul reached in front of the house of Shyam Babu Sharma, he saw all the three accused persons standing near Gumti Tiraha. Arvind inflicted knife blow upon Atul and then the remaining other two accused inflicted knife blows on Atul. However in the first information report there was no allegation that the other two accused had also assaulted the deceased. In the first information report specific case was that only one knife blow was inflicted on Atul.

It appears that after coming to know of the medical report, for the first time at the trial the witness developed the case that all the three accused persons had inflicted knife blows in order to bring the version in consonance with the medical evidence. The witness was elder brother of Atul. It appears to be highly unnatural that even after seeing attack on his younger brother this witness would remain standing there only as a passive spectator. This unnatural conduct also renders his presence on the spot doubtful. Faced with this situation, the witness made a development in his statement before the trial Court that Virendra accused had made an attempt to assault him whereupon he ran away from the spot. No such fact was either stated in the first information report or during investigation.

21. In addition to the above infirmities presence of this witness is conclusively negated by the statement of deceased Atul which was recorded in Ursala Hospital and has been got proved by defence as Ex. Kha. This statement was recorded on 22-10-79 by the Magistrate as dying declaration of Atul and has been brought on record from defence side. Perusal of Ex. Kha. 1 shows that Atul nowhere stated of the presence of Anil Prakash P.W. 1 at the scene of occurrence. Not only this the story as given by P.W. 1 in his statement and as was set up in the F.I.R. entirely differs from the one contained in Ex. Kha 1. In the statement as contained in Ex. Kha 1 the deceased had mentioned clearly that he was coming on a cycle after collecting Rs.200/- and when he was about 50 or 60 paces away from his house 6-7 persons met him. At that time Shailesh was also with him on the cycle and both fell down as a result of assault made by the miscreants. Shailesh ran away to save himself.' Some ladies also arrived. The assailants robbed him of cash of Rs.200/- and his watch and a golden chain and ran away. It does not sound to reason that if his own brother Anil Prakash was accompanying him at the time of incident, Atul would have omitted his name while narrating the incident to the Magistrate which was reduced into writing as Ex. Kha 1. The place of incident as stated by P.W. 1 before Court also differs from the one as mentioned in Ex. Kha. 1. Names of other eye witnesses as stated by this witness are also different from the one mentioned in Ex. Kha 1. In view of all these infirmities, unnaturalities and improbabilities it will be too hazardous to place implicit confidence in the testimony of P.W. 1 Anil Prakash, the sole witness produced from the prosecution side. We thus agree with the conclusion of the trial

Judge that it was highly doubtful that P.W. 1 Anil Prakash was present at the scene of occurrence and had witnessed the incident.

22. Before the trial Court the prosecution placed reliance upon Ex. Ka 11, the dying declaration of Atul Prakash recorded by the Investigating Officer. The trial Court has, however, discarded the same for cogent reasons. This statement is said to have been recorded by the investigating officer on 9-11-79 i.e. after twenty days of the incident. The statement is said to have been recorded when the investigating officer interrogated Atul Prakash in Ursala Hospital, Kanpur. Undisputedly during this interval of twenty days the deceased had met the first informant, his father and many other persons. The said statement was also not got signed by any independent witness. On examination of record we also find that no weight could be attached to this piece of evidence.

23. The learned Sessions Judge has however based conviction of the appellant on defence document Ex. Kha 1, the statement of Atul Prakash which was recorded in Ursala Hospital, Kanpur by the Magistrate in the presence of doctor S.M. Sharma, P.W. 6. It may be pertinent to note here that prosecution itself did not rely upon this document on the ground of the same being not a voluntary statement of Atul Prakash. It was brought on record by the defence for a limited purpose i.e. to create a doubt in the presence of P.W. 1 at the time of occurrence and further to show that case of robbery has been purposely given a complete go-by by the prosecution.

24. On the other hand learned A.G.A. appearing for the State submitted before the Court that it is now well settled law that conviction can be based upon dying declaration alone.

25. Question of admissibility of a dying declaration has been the subject matter of judicial scrutiny since long. It is now well established that dying declaration alone can be the basis of conviction without corroboration and need of corroboration arises where the Court finds that the dying declaration is not reliable and suffers from any infirmity. (See cases of Khushal Rao AIR 1958 SC 22 and Tapinder AIR 1970 SC 1566)

26. The Apex Court in *Munnu Raja v. State of M.P.* A.I.R. 1976 SC 2199 stated the law to the effect that though the dying declaration must be approached with caution for the reason that the maker of the statement cannot be subjected to cross examination, there is neither a rule of law nor of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless corroborated. If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it without corroboration (*State of U.P. v. Ram Sagar Yadav* 1985 All Cri C 79:(AIR 1985 SC 416)

27. Since the maker of statement is not before the Court for being subjected to cross examination, it must be scrutinised and attending circumstances considered cautiously and carefully to ensure that the dying declaration is voluntary and not the result of tutoring, prompting or imagination. In the case of *Rasheed Beg v. State* 1974 SCC(Cri), 426:(AIR 1974 SC 332) it was held that where there are reasonable possibilities of tutoring dying declaration alone cannot be made the basis of conviction. In the same decision it was further held that where dying declaration is suspicious it should not be acted upon.

28. In another decision of *State of U.P. v. Madan Mohan* 1989 All Cri C 368,:(AIR 1989 SC 1519) it was held by the Apex Court that where the prosecution version differs from the one given in the dying declaration, the dying declaration alone cannot be made basis of conviction.

29. In the light of these principles, we have thoroughly examined the facts of the present case. As already stated above the prosecuting agency itself did not rely upon the Statement of Atul Prakash which was recorded in the night of occurrence in Ursala Hospital by Magistrate and therefore neither the Magistrate was cited as a witness in the charge sheet nor copy of the dying declaration was furnished to the accused. On the other hand the prosecution relied upon the statement of Atul Prakash which the investigating officer had recorded after twenty days on 9-11-79. In the said statement Atul Prakash had himself admitted that before the Magistrate he had given a tutored and incorrect statement. It is thus obvious that the prosecution case itself was that the statement of Atul Prakash recorded by the Magistrate was the result of tutoring and prompting and for the same reason that

statement was not relied upon from the prosecution side. It was brought on record from the side of accused for a limited purpose i.e. to create doubt in the claim of P.W. 1 of his being present at the scene of occurrence and also to show other inconsistencies and contradictions such as place of occurrence, name of witnesses etc. Contents of this document were not proved as the Magistrate was neither cited as a witness in the charge sheet nor produced at the trial. When he was not produced as a prosecution witness the defence had no opportunity to cross examine him to test the veracity of that statement. In any view of the matter there are other infirmities in the dying declaration which cannot be ignored, lightly P.W. 2 Ram Sewak Shukla is the father of deceased. As per the statement of P.W. 1 and P.W. 2 Ram Sewak Shukla had accompanied when victim Atul was taken in a Bus to Kanpur Hospital. P.W. 2 admitted that inside the bus police constable and many other persons of Kasba Auraiya were also present. Dinesh was also with him. In the statement given to the investigating officer on 9-11-79 Atul Prakash himself admitted that while he was brought in bus to Kanpur, he was tutored by his father and others to give a distorted and exaggerated version and therefore, he gave an incorrect version in his statement which was recorded by the Magistrate in the Ursula hospital. The place of occurrence as per this document is entirely different from the one claimed in the prosecution story. Names of eye witnesses which were disclosed in this document also differ from the one as were mentioned in the first information report. For all these infirmities Ex. Kha 1 could not be made basis of conviction.

30. As presence of P.W. 1 at the scene of occurrence has been held to be doubtful and the Court has found his evidence wholly untrustworthy it would be wholly unjustified, improper and hazardous to convict the appellant on the sole basis of Ex. Kha 1, brought on record from defence side for a limited purpose, particularly when the said document was not tendered in Court from prosecution side and it was not being relied upon on the ground that the said statement of Atul contained distorted and incorrect version as a result of tutoring and prompting. In our opinion the learned Session Judge has committed a gross error in convicting the appellants solely on the basis of Ex. Kha 1. Accordingly we are unable to uphold the judgment under appeal.

31. For the reasons assigned above criminal appeal No. 482/81 of Arvind Kumar is allowed. His conviction and sentence as recorded by the trial Court are set aside and he is acquitted of the offences charged for. He is on bail. He need not surrender. His bail bonds are cancelled and sureties discharged. Criminal Appeal No. 518/81 of Anil alias Pappu stands disposed of as abated.

Both the appeals are disposed of accordingly.

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