

**Mahender Vs State**

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**Court :** Delhi

**Decided On :** Oct-08-2010

**Judge :** Mr. Badar Durrez Ahdmed ; Mr. V.K. Jain. J J

**Acts :** Indian Penal Code (IPC) - Section 302

**Appeal No. :** CRL.A. 322/1997 ; CRL.A. 174/1998

**Appellant :** Mahender

**Respondent :** State

**Advocate for Def. :** Ms Richa Kapoor,

**Advocate for Pet/Ap. :** Mr. M.L. Yadav , Mr. M. Shamikh, Advs.

**Judgement :**

1. Whether Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

## **ORDER**

.1. This appeal is directed against the judgment dated 31.07.1997 and Order on Sentence dated 12.08.1997, whereby the appellants were convicted under section 302 of the Indian Penal Code (IPC) read with section 34 thereof and were

sentenced to imprisonment for life and to pay fine of `1,000/- each or to undergo rigorous imprisonment for six months each in default.

2. The case of the prosecution, in brief, is that on 31.08.1993 there was a severe altercation between deceased Samad on one hand and the appellants Rehman and Mahender on the other hand, when the appellants told the deceased that it was not proper for him to make complaints against others. This is also the case of the prosecution that on 01.09.1993 also there was an altercation between them at about 11:00 A.M. Then, at about 2:30 A.M. they committed murder of Samad on the street of D-Block, New Seema Puri, using a hockey and a danda for the purpose. The informant Rafiq took him to Guru Teg Bahadur Hospital in a rickshaw, where the deceased was declared dead.

3. The prosecution examined 16 witnesses in support of its case, one witness was examined in defence.

4. The case of the prosecution against the appellants rests on ocular as well as circumstantial evidence. Three persons, namely, Rukia, Rafiq and Salim were stated to be eye witnesses of the incident. Ocular Evidence

5. Salim came in the witness box as PW-1 and stated that when he reached the spot he came to know of quarrel between Samad and the accused persons, though he himself did not witness the incident. He was not able to say how the deceased had received injuries. He claimed that no injury was inflicted in his presence. He was cross-examined by the learned Addl. Public Prosecutor, but nothing came out in the cross-examination, which may connect either of the appellants with the murder of Samad.

6. Rukaia came in the witness box as PW-2, but did not support the prosecution. She claimed that no quarrel had taken place at her shop and no one was killed in her presence. She expressed total ignorance about the matter. She was also cross-examined by the learned APP but nothing incriminating to the appellants came out in her cross-examination.

7. The informant Rafiq who came in the witness box as PW-14, however, supported the prosecution and stated that on 2nd October, there was exchange of hot words between the appellants and the deceased at about 10:00 AM, since the deceased was a police informer and used to make complaints against various persons. He further stated that at about 2:30-3:00 PM on that day, accused persons caused injuries to the deceased, using danda carried by accused Mahender and hockey carried by accused Rehman. He lifted the injured, put him on a cot and then took him to GTB Hospital on a rickshaw. Though the accused chased him, he did not stop the rickshaw and admitted the injured in hospital. He also identified the lathi Ex.P-1 and the hockey Exhibit P-2 as the weapons used for causing injuries to the deceased.

8. In his cross-examination Rafiq has admitted that his wife Halima had married the appellant Rehman on 22nd July, 1992. Halima came in the witness box as DW-1 and stated that Rafiq who was her husband before she married Rehman, had lodged a complaint against Rehman in which she was forced to depose against him though he was later acquitted. According to her, she was divorced by Rafiq and she married Rehman on 22.07.1992. She also stated that Mahender, co-accused of Rehman, was instrumental in getting her married to Rehman. Rafiq was unhappy with her second marriage and, therefore, had become inimical to Rehman as well as to Mahender. Exhibit D1 is the marriage agreement dated 22.07.1992 between DW-1 Halima and the appellant Rehman, which was witnessed by the appellant Mahender. Considering the fact that DW-1 Halima had married the appellant Rehman, the relations between the appellant Rehman and PW-14 Rafiq could not have remained cordial and Rafiq was likely to harbour a grudge against Rehman for marrying Halima. In fact, the strain in relations between the appellant Rehman and PW-14 Rafiq is also evident from the fact that a criminal case was instituted by Rafiq against Rehman, which ultimately had resulted in his acquittal. Rafiq, therefore, had a strong motive to depose against Rehman and considering the enmity and ill-will between them, given an opportunity he could also have implicated in a false case. Since the appellant Mahender was instrumental in getting Halima married to Rehman and had also witnessed the marriage agreement between them, Rafiq was likely to have become inimical to him as well for aiding Rehman in marrying his wife Halima. It is,

therefore, difficult to dispute that Rafiq was an 'interested witness' against the appellants.

9. As observed by the Supreme Court in *Ashok Kumar Chaudhary vs. State of Bihar*: 2008 Cri LJ 3030, the term "interested" postulates that the person concerned has some direct or indirect interest in seeing that the accused is somehow or the other convicted either because he had some animus with the accused or for some other oblique motive. As observed by the Supreme Court in *Dalip Singh vs. State of Bihar* 1954 SCR 145 a witness who is otherwise considered to be independent becomes tainted if he has an enmity against the accused to wish to implicate him falsely.

10. The settled proposition of law therefore is that an interested witness is not necessarily an unreliable witness and partisanship by itself not a valid ground for outrightly discarding him or rejecting his testimony at the very threshold. It is also not an invariable rule of law that interested evidence can never form the basis of conviction, unless corroborated in material particulars, by independent evidence. What is, however, necessary is to subject the testimony of an interested witness to a careful scrutiny and analyse it with caution, considering the strained relations and animus between the parties. If on such scrutiny the testimony of an interested witness is found to be intrinsically reliable or inherently probable, it is permissible, in the facts and circumstances of a case, to base the conviction on the testimony of such a witness. The court needs to ascertain whether the version of the incident given by the witness is consistent with other evidence on record, natural course of human conduct, surrounding circumstances and inherent probabilities of the case and is such which a prudent person would reasonably expect. If on such careful scrutiny, the evidence of the witness is found to be free from flaw and suspicion, it is open to the court to base conviction on it. If, however, the testimony of such a witness, on a careful scrutiny by the court, keeping the previous animus between the parties in mind, appears to be suspect, improbable or against natural course of human conduct, it will not be safe to base the conviction on the testimony of such a witness unless corroboration of his testimony from independent sources is available on record.

11. In *Masalti vs. State of U.P.* AIR 1965 SC 202, the Supreme Court observed that the evidence of an interested or partisan witness is to be weighed very carefully by the court though mechanical rejection of his testimony on the ground of partisanship alone would lead to failure of justice. In *State of Rajasthan vs. Chandu and ors.* JT 2002 (1) SC 427, it was noticed that there was severe enmity between the complainant group and the accused group and the relations between them were fiercely inimical. The Supreme Court, therefore, held that it was prudent to look for corroboration of the eye witnesses of material particulars. Considering the discrepancies in their testimony and absence of independent evidence, the appeal filed by the State against the acquittal of the accused persons was rejected.

12. In *State of Punjab vs. Harbans Singh and another* (2003) 11 SCC 203, it was found that two witnesses PW-4 and PW-11 belonged to different political factions and, therefore, were not on friendly terms with the accused. Considering them as partisan witnesses, the Supreme Court noticed various discrepancies in their evidence and since no independent witnesses were examined, the appeal filed by the State against acquittal of the accused persons was dismissed. In *Mohinder Singh and another vs. State of Punjab and others* (2004) 12 SCC 311, there was attack on the complainant party by the accused about two years before the incident of murder alleged to have been committed by them. PW-4 and PW-5 were eye witnesses of the incident of murder. It was found that there was enmity between the families of the accused and the family of witnesses who also belonged to the family of the deceased. No independent witness was examined and there were contradictions with respect to the time of incident. The Supreme Court, therefore, did not find it safe to place reliance on the testimony of PW-5 without any independent corroboration which was lacking in the case. The testimony of PW 4 who was an accused in the criminal case lodged against him by one of the accused persons was also held to be an interested witness and considering his conduct and other discrepancies noted in his deposition, his testimony was also rejected for want of independent corroboration.

13. Considering that Rafiq had earlier instituted criminal proceedings against the appellant Rehman and thereafter his wife Halima had married him with the aid and

assistance from the appellant Mahender, it would be reasonable to infer that he would have liked to settle scores with them in one way or the other.

14. We now proceed to analyse the testimony of PW-14 Rafiq keeping in mind that fact that he was inimical to the appellants and harbored a grudge against them at the time the incident resulting in murder of the deceased took place. Rafiq has admitted in his cross-examination that both the appellants were known to him for the last about 20 years. A perusal of the MLC of the deceased would show that though the deceased was brought to the hospital by Rafiq he did not give the name of either of the appellants to the doctor and claimed that the deceased was beaten by a 'group of people'. This is not the case of Rafiq that though the names of the assailants were given by him to the doctor, there was failure on his part to note them in the MLC. Rafiq has expressly admitted in his cross-examination that he did not tell the doctor that the accused persons had inflicted injuries on the deceased. He claimed that he had no occasion to tell the same to the doctor. This part of his statement is obviously false since he told the doctor that the deceased was beaten by a group of persons. Had he actually witnessed the incident he could not have omitted the names of the assailants to the doctor, particularly, when they were known to him for the last many years and he was also inimical to them. The failure of the witness to name them to the doctor indicates a strong possibility of his having reached the spot after the incident had already taken place. This is more likely when we consider that fact that according to Rafiq he was residing in B Block whereas the incident took place in D Block. According to Rafiq, about 10-15 persons were already present on the spot when he reached there. He claimed that no one tried to rescue the deceased. The reason given is that the accused persons were armed with lathi and hockey. It is rather unlikely that at a public place and in day time a number of persons will just keep watch when a person is being subjected to lathi and hockey blows and will not even make an attempt to save him. This is not the case of the prosecution that either of the appellants was armed with a deadly weapon such as a revolver/pistol or a knife. Use of lathi and hockey, in our view, was not likely to deter the large number of persons who were present on the spot from making even an effort to save the deceased.

15. According to Rafiq, his clothes had got stained with blood when he lifted the deceased for putting him in rickshaw. His cloths, however, have not been seized by the Investigating Officer and the IO does not claim that he had seen the witness in bloodstain clothes when he met him in hospital. Had the clothes of this witness got stained with blood, as claimed by him, that could not have escaped the attention of the IO and the cloths would in that case have been seized by him.

16. According to Rafiq blood of the deceased had come on the cushion of the rickshaw. No blood stains were, however, seized by the police from any rickshaw. In fact no rickshaw at all was seized by the IO despite the informant having told the police that the deceased was brought by him to the hospital in a rickshaw.

17. According to PW-14 Rafiq he himself had pulled the rickshaw in which he took the deceased to hospital after he had lifted him and put him in rickshaw. This witness does not claim to be a rickshaw puller. We fail to appreciate why he would have pulled the rickshaw of someone else, all the way to the hospital. In normal course of events, in such a case, the rickshaw would have been pulled by the rickshaw-puller and the witness would have occupied the rear seat along with the injured. Therefore, this is yet another circumstance which creates a serious doubt on the truthfulness of the version given by the witness.

18. The case of the prosecution is that Rafiq was present in his house when he hearing the noise, reached the place of incident in Block D. As noted earlier by us, the witness was residing in Block B. It must have taken sometime to him to reach the spot from his residence. It is difficult to accept that the incident of beating lasted so long so as to give enough time to this witness to reach the spot from his house and then also witness the actual beating of the deceased. There is reasonable possibility of the witness having reached the spot after the incident was already over and then having taken the injured to the hospital.

19. Since PW-14 Rafiq is a partisan witness neither of the other eye witnesses has supported the prosecution even partially, considering the unnatural conduct of the witnesses, coupled with the discrepancies found in his testimony and improbability of the version given by him, it will not be safe to convict the appellants solely upon his testimony.

20. This is not the case of the prosecution that there was any dispute between the deceased on one hand and either of the appellants on the other hand. It has come in evidence that the deceased used to make complaint to the police against others. According to PW-14 complaints were made by the deceased to the police against Shabir, Chairman and Raj Kumar. There is no allegation of the deceased having made complaint against either of the appellants. Therefore, they had absolutely no motive to commit murder of the deceased. Though it has come in the deposition of PW-14 that was exchange of hot words between the appellants and the deceased at about 10:00 AM on that day, there is no report with regard to that incident. No independent witness of the alleged exchange of hot CRL. A. Nos.322/ 97 & 174/98 Page 14 of 16 words has been produced by the prosecution. As noted earlier, Rafiq had enmity against the appellants, one of them having married his wife with the aid and assistance of the other and a criminal case also having been instituted by him against the appellant Rehman, which had resulted in his acquittal. We feel that in the facts and circumstances of the case, there is a rather strong possibility of PW-14 having reached the spot after the incident was already over and then having taken the deceased to the hospital. This hypothesis also explains his not giving the name of the assailants to the doctor, his clothes not having been seized and other discrepancies found on his deposition. CIRCUMSTANTIAL EVIDENCE

21. As regards the alleged recovery of a hockey at the instance of the appellant Rehman from the roof of House No. B-649, New Seema Puri, we notice that C-649, New Seema Puri was the address of the informant Rafiq as is evident from the FIR lodged by him. The T-Shirt when examined in the laboratory was found stained with human blood of AB group, which was also the blood group of the deceased. Hockey stick was also found stained with human blood of the same group. We notice that there is no evidence of any grappling between the deceased and the appellant Rehman. The case of the prosecution is that a lathi and a hockey stick were used by the appellants for causing injuries to the deceased. It is rather unlikely that the T-Shirt of the assailant would get stained with blood when he is causing injuries using a hockey for the purpose and he does not come into contact with the injured person. Be that as it may, the alleged recoveries of a blood stained hockey stick and a blood stained T-Shirt alone are not sufficient to prove

the guilt attributed to the appellant Rehman if the testimony of PW-14 Rafiq is excluded from the consideration.

22. For the reasons given in the preceding paragraphs, both the appellants are given benefit of doubt, their appeals are allowed and they are hereby acquitted. Their Bail Bonds stand discharged.

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