

STATE OF U.P.

V.

SHEO LAL & ORS.

Criminal Appeal No. 362-363 of 2002

FEBRUARY 12, 2009

**[DR. ARIJIT PASAYAT AND DR. MUKUNDAKAM
SHARMA, JJ.]**

Penal Code, 1860 :

ss. 302 r/w s. 34 and s. 323 r/w s. 34, s. 354 – Murder – Allegation of molestation by niece of deceased against accused person – Fatal injuries to deceased as also injuries to eye-witness – Conviction by trial court – However, acquittal by High Court – Sustainability of – Held: Not sustainable – Judgment of High Court full of contradictions – There was total non-application of mind – Evidence of injured eye-witnesses cannot be discarded – Accused were not strangers to witnesses and as such the identification was possible in dark night.

According to the prosecution case, SR and S tried to molest their cousin PW4. Brother of PW 4 complained to the family of SR and S. Thereafter, at night SL, father of SR along with SR and S armed with weapons went to the house of KP-uncle of PW4. They hurled abused and inflicted fatal injuries to KP. PW 1, 2, 4 and other family members came to the spot. PW-2 also sustained injuries. FIR was lodged. PW 1 to 4-eye witnesses were examined. Trial court convicted accused persons u/s. 302 r/w s. 34 and s. 323 r/w s. 34 IPC. Accused S was also convicted u/s.354 IPC. However, High Court acquitted the accused. Hence the present appeals.

Allowing the appeals, the Court

HELD: 1.1 One of the prime reasons indicated by the High Court to discard the prosecution version is that in a

- A dark night the possibility of identification was not there. The source of light for identification was not mentioned in the FIR. There were four of the witnesses and some of them were injured in the incidence. PW2 was an injured eye witness. His evidence has been discarded on the ground that the injury sustained by him was a typical bruise. The observations of the High Court show total non application of mind. [Para 5] [348-C]
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- 1.2 Merely because the colour of the injury was not noted and the doctor has written that the injury was fresh, that is no ground to discard his evidence. High Court has also attached unnecessary importance to the fact that one witness stated that the assault continued for 8 to 10 minutes while another said it was around three minutes. The doctor's evidence was discarded on the ground that his testimony was of poor quality and does not inspire confidence. The injury appeared to be manufactured one. The judgment is full of contradictions. High Court at one place noticed that it is improbable that the accused person who was cousin of PW 4 tried to molest her. In the same breath the High Court in another place has held that the accused persons to molest PW 4 at a particular moment took her to the Arhar field and this was done with her prior consent. High Court goes further to say that there was no planning in the act and had appeared to be chance meeting which led to it. The absurdity of the High Court's conclusions can be gauged from the fact that the High Court found it unnatural that two girls of almost of the same age group were walking and as to why one of them would move ahead and the other would come behind is unnatural. High Court further has held that PW 3 stated in Court that PW4 on her return told him that accused persons has teased her in the field. High Court found fault with the statement on the ground that he did not tell before the police that the girl did not tell PW 3 that the accused persons held her hands. So far as the High Court's
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conclusions that there was non-mention of the source of light in the FIR it needs to be noted that the accused persons were not strangers to the witnesses. They were closely related. Therefore, High Court's judgment is clearly unsustainable and is set aside. The judgment of the trial court is restored. [Paras 6 and 9] [349-A, B, C, D, E; 350-F]

Nathuni Yadav v. State of Bihar 1998 (9) SCC 238;
Bharosi v. State of M.P. 2002 (7) SCC 239; *S. Sudershan Reddy v. State of A.P.* 2006 (10) SCC 163 – referred to.

Case Law Reference

1998(9) SCC 238 Referred to. Para 7

2002(7) SCC 239 Referred to. Para 8

2006(10) SCC 163 Referred to. Para 8

CRIMINALAPPELLATE JURISDICTION : Criminal Appeal
 Nos. 362-363 Of 2002

From the final Judgement and Order dated 16.12.1999 of the High Court of Judicature at Allahabad in Criminal Appeal No. 182 & 472 of 1980.

Sahdev Singh, Mukesh Verma and Chandra Prakash Pandey, for the Appellant.

Irshad Ahmad, Arvind Kumar Shukla, G.D. Misra, Ashutosh Pathak, Peter Sungnem and Nihal; for the Respondent.

The Judgement of the Court was delivered by

DR. ARIJIT PASAYAT, J.

1. Challenge in these appeals is to the judgment of a Division Bench of the Allahabad High Court directing acquittal of the respondents. By the impugned judgment two appeals were disposed of. The appellant-accused in each case had questioned correctness of the judgment rendered by learned 9th Additional Sessions Judge, Kanpur in ST Case Nos. 190 of 1979 and 212 of 1979. Each was convicted for offence

A punishable under Section 302 read with Section 34 and Section 323 read with Section 34 of the Indian Penal Code, 1860 (in short the 'IPC') respectively. Additionally, accused Surender was convicted for offence punishable under Section 354 IPC.

B 2. Prosecution version as unfolded during trial is as follows:

In the evening of 20.3.1979 at about 6.00 pm Km. Sharmi (PW 4) was going to attend the call of nature. She was moving few steps ahead of Km. Munni. It is alleged that at the relevant moment Surendra and Suresh accosted Km. Sharmi. They told C her to accompany them into Arhar field and with that intent they also held her hands. On the alarm raised by her Km. Munni rushed to her rescue. At this, both the accused persons took to their heels. On her return to the house, Km Sharmi (P.W.4) D narrated the incident to her maternal uncle Krishanapal, the deceased in the incident, and Vijaypal (P.W.3). Both the brothers, went to the house of accused Sheo Lal, and made a complaint about the shameful behavior of his son and nephew. Having made the complaint they came back to their house.

E The deceased, Krishnapal, and his brother Vijaypal were relaxing and smoking Bidis on the Chabutara, which abuts their house. A burning lantern was also hanging near the grass-cutting machine. A lamp was also burning at the main door of the house.

F At about 8.00 P.M. Sheo Lal accompanied by Suresh and Surendra came to the house of Krishanapal, deceased. Sheo Lal and Suresh were armed with Lathis and Surendra was armed with a knife. Immediately on their arrival near the deceased, they started hurling abuses and said that since they are maligning his family, inflicted lathi injuries upon the deceased and Surendra attacked him with knife. The hue and cry raised G by the deceased attracted Ratipal (P.W1), Chandrapal (P.W.2), Km. Sharmi (P.W.4) and some other family members to the spot. Ratipal was also possessing a torch in his hand. Chandrapal was also attacked with lathis when he tried to intercede. He H

had sustained lathi injuries. As a result of the injuries sustained, Krishanapal fell down and died instantaneously. The accused persons withdrew thereafter.

The F.I.R. of the incident was lodged by Vijaypal (P.W.3). The written report is Ext. Ka.1. It was scribed by Rampal and was lodged at P.S. Bidhnoo at 11.15 P.M. He was accompanied to the police station by Ratipal, Chandrapal and Rampal. The chick is Ext. Ka. 2. It was prepared by P.W. Lallan Singh, Head Moharir.

Chandrapal (P.W.2) was sent from the police station to the Primary Health Center, Bidhnoo for medical examination of his injuries. He was escorted by constable Mahipal (P.W.5), for that purpose.

After completion of investigation charge sheet was filed. As the accused persons pleaded innocence trial was held. The trial court recorded conviction. As noted above separate appeals were filed by each one of the accused persons which were disposed of by the common judgment directing their acquittal. The stand of the accused appellant before the High Court was that the motive suggested is clearly unacceptable as the parties are inter-se related and it is improbable that the accused persons will tried to molest their cousin (PW 4) in the manner as alleged by the prosecution. It was submitted that the incident has not occurred in the manner alleged and the FIR was ante dated. The trial court placed reliance on the evidence of four eye witnesses PW 1 to PW4. The High Court noted that so far as the motive is concerned the only witness is PW 4. The High Court accepted the defence version that the motive was not established and the accusations were also not established. Accordingly, it directed acquittal.

3. In support of the appeals, learned counsel for the appellant submitted that the conclusions of the High Court are absolutely unsustainable. What appears to have weighed with the High Court to doubt verity of prosecution version is the introduction of a witness i.e. Munni Devi regarding the motive.

A The conclusions are based on presumption and surmises. There were contradictory observations and no reason has been indicated to discard the version of the injured eye witnesses.

4. In response, learned counsel for the respondents supported the judgment of the High Court.

B 5. One of the prime reasons indicated by the High Court to discard the prosecution version is that in a dark night the possibility of identification was not there. The source of light for identification was not mentioned in the FIR. It is significant to note that there were four of the witnesses and some of them were injured in the incidence. PW2 was an injured eye witness. His evidence has been discarded on the ground that the injury sustained by him was a typical bruise. The following observations of the High Court show total non application of mind.

D "Now we take up the testimony of Chandrapal (P.W.2), who, according to the prosecution, is an injured witness. He has sustained these injuries while trying to intervene. His injury was examined on 20-3-1979 at 11.30 p.m. His medical examination was conducted by Dr. A.K. Shukla (P.W.8). This witness has sustained only a solitary contusion. The injury is 21 cm.x 15 cm. On the left side of back crossing the spine upto the right side at the level of fourth vertebral column. The injury was simple and was fresh at the time of medical examination. The Doctor has not noted the color of this injury. He stated that by writing 'fresh' he meant that the injury was 2/3 hours old. He has made the entry with regard to this injury in the out door patients' register. When this doctor was examined in court, the injured was not present before him. He has not noted down the depth of the bruise. He had admitted that these bruises could be managed with a chemical. He had stated in court that the injury sustained by injured Chandrapal was a typical bruise. It was depressed in the middle and the edges were slightly raised, but when probed further he admitted that these facts, were not noted down by him in the injury report or any where else."

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6. Merely because the colour of the injury was not noted and the doctor has written that the injury was fresh, that is no ground to discard his evidence. The High Court has also attached unnecessary importance to the fact that one witness stated that the assault continued for 8 to 10 minutes while another said it was around three minutes. The doctor's evidence was discarded on the ground that his testimony was of poor quality and does not inspire confidence. The injury appeared to be manufactured one. The judgment is full of contradictions. As stated above, the High Court at one place noticed that it is improbable that the accused person who was cousin of PW 4 tried to molest her. In the same breath the High Court in another place has held that the accused persons to molest PW 4 at a particular moment took her to the Arhar field and this was done with her prior consent. The High Court goes further to say that there was no planning in the act and had appeared to be chance meeting which led to it. The absurdity of the High Court's conclusions can be gauged from the fact that the High Court found it unnatural that two girls of almost of the same age group were walking and as to why one of them would move ahead and the other would come behind is unnatural. The High Court further has held that PW 3 stated in Court that PW4 on her return told him that accused persons has teased her in the field. The High Court found fault with the statement on the ground that he did not tell before the police that the girl did not tell PW 3 that the accused persons held her hands. So far as the High Court's conclusions that there was non-mention of the source of light in the FIR it needs to be noted that the accused persons were not strangers to the witnesses. They were closely related.

7. In Nathuni Yadav v. State of Bihar [1998(9) SCC 238] this Court observed that under what circumstances the lack of moonlight or artificial light does not per se preclude identification of the assailants. It was noted as follows: (SCC p. 242, para 9)

"Even assuming that there was no moonlight then, we have to gauge the situation carefully. The proximity at which the

A assailants would have confronted with the injured, the possibility of some light reaching there from the glow of stars, and the fact that the murder was committed on a roofless terrace are germane factors to be borne in mind while judging whether the victims could have had enough visibility to correctly identify the assailants. Over and above those factors, we must bear in mind the further fact that the assailants were no strangers to the inmates of the tragedy-bound house, the eyewitnesses being well acquainted with the physiognomy of each one of the killers. We are, therefore, not persuaded to assume that it would not have been possible for the victims to see the assailants or that there was possibility for making a wrong identification of them. We are keeping in mind the fact that even the assailants had enough light to identify the victims whom they targeted without any mistake from among those who were sleeping on the terrace. If the light then available, though meagre, was enough for the assailants why should we think that the same light was not enough for the injured who would certainly have pointedly focussed their eyes on the faces of the intruders standing in front of them. What is sauce for the goose is sauce for the gander.”

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8. The position was reiterated in Bharosi v. State of M.P. [2002(7) SCC 239] and S. Sudershan Reddy v. State of A.P. [2006(10) SCC 163].

F 9. The High Court’s judgment therefore is clearly unsustainable and is set aside. The judgment of the trial court is restored. The respondents shall surrender to custody forthwith to serve the remainder of sentence.

G 10. Appeals are allowed.

N.J.

Appeals allowed.