

A

STATE OF U.P.

v

ABDUL KARIM AND ORS.

JULY 26, 2007

B

[DR. ARIJIT PASAYAT AND P.P. NAOLEKAR, JJ.]

Penal Code, 1860:

C

s.302 r/w s.34—Death pursuant to assault with iron rod and sharp cutting weapons—Conviction of accused-Respondents by Trial Court—Set aside by High Court in appeal—Appeal against the acquittal—Held: One eye-witness partially resiled from her statement made during investigation—Another stated that he saw the accused persons committing assaults, but in cross examination admitted that he reached when the assault was over—All the witnesses were far away from the field where the alleged incident took place—Field was also obstructed by standing crops of sugarcane not less than 6-7 ft in height—Therefore they could not have seen the assaults—Additionally, though all witnesses stated that accused persons were carrying sharp cutting weapons and rods, not even one injury was incised—In view of the total discrepant nature of evidence, High Court rightly discarded the prosecution version and set aside the conviction.

D

E

F

According to the prosecution, the Respondents assaulted the husband of PW1 with iron rod, spade and 'kassi' and thereby caused his death. The incident occurred at the agricultural field of the deceased. One day prior to the incident, deceased had an altercation with one of the Respondents. Trial Court convicted the Respondents under s. 302 r/w s. 34 IPC placing reliance upon the evidence of PWs 1, 2 and 3, all of whom are stated to be eye-witnesses. PW2 and PW3 are respectively the brother and son of PW1. High Court, however, acquitted the Respondents holding that the prosecution had failed to establish its acquisitions *vis-a-vis* them. Hence the present appeal.

G

Dismissing the appeal, the Court

HELD: 1.1. PW-1 partially resiled from her statement made during investigation. According to her, she saw the assailants from a distance of one mile. Sugarcanes were standing in the field which intervened between the

H

place where she was and the field where the incident occurred. She accepted that she had not herself seen the assault but saw the accused persons while they were making their escape towards the jungle. She claimed to have seen them running from a distance of one mile. She further admitted that in between the village and her field number of fields were situated where sugarcane and wheat crops were standing. [Para 9] [545-H; 546-A-B]

1.2. PW-2 stated that he had also seen the accused persons committing the assaults. But in the cross-examination he admitted that he had come to the place when the assault was over and he had seen the accused persons running towards the jungle in the sugarcane field. He accepted that he was with PW 1. [Para 10] [546-C]

1.3. PW-3 was a child of 9 years at the time of incident. He also admitted to have seen the accused persons running away with their backs towards him standing near his mother. [Para 11] [546-D]

2. The evidence of PWs 1, 2 and 3 clearly indicated that they were far away from the field where the alleged incident took place. The High Court noted that identification was practically impossible from such a large distance particularly when the field was obstructed by standing crops of sugarcane which were not less than 6-7 ft in height. The High Court therefore rightly observed that they could not have seen the assaults not only because of the distance but because of the presence of heights of crops of sugarcane. Additionally, though all the witnesses stated that the accused persons were carrying sharp cutting weapons and rods, not even one injury was an incised one. All the injuries were either lacerated wounds or contusion.

[Para 12] [546-D-E]

3. In view of the total discrepant nature of the evidence, the High Court has rightly discarded the prosecution version and set aside the conviction.

[Para 13] [546-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 364 of 2002.

From the Judgment & Order dated 15.05.2000 of the High Court of Judicature at Allahabad in Criminal Appeal No. 1019 of 1980.

M.C. Dhingra, Vijay Pratap Singh, Anuvarat Sharma and Praveen Swarup for the Appellant.

A Asijit Kumar Roy and Premanand M.S. (for Surya Kant) for the Respondents.

The Judgment of the Court was delivered by

B **DR. ARIJIT PASAYAT, J.** 1. The State of U.P. has filed this appeal against the judgment passed by a Division Bench of the Allahabad High Court directing acquittal of the three respondents (hereinafter referred to as the 'A-1, A-2 and A-3') respectively.

C 2. The accused persons were convicted for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code, 1860 (in short the 'IPC') by the IVth Additional and Sessions Judge, Bareilly in Sessions Trial No. 359/78.

3. Background facts in a nutshell are as follows:

D The first information report (Ex. Ka. 1) was to the effect that Buddhi was the husband of the complainant (PW-1) whereas A-1, Abdul Karim was his elder brother. He was indebted to some Punjabi, and hence had mortgaged his house and 1½ bigha agricultural land with him and abandoning the village 20 years back had gone to Baheri and settled there with his wife and children. The husband of the complainant redeemed that property after paying debt of the Punjabi and exercised possession over the house and agricultural land of that accused. Three months before the occurrence accused Abdul Karim approached her husband and requested him to return his house or to build a shop for him. Hence her husband had given him a shop in a portion of his house. Subsequently, he has summoned his son, Salim to the village and both of them started grocery shop therein. Subsequently some dishonesty cropped in his mind and he started pressing for return of his house and 1½ bigha agricultural land but her husband refused to do so. The agricultural plot of the accused exists by the side of the plot of the deceased, hence he used to cultivate the same together. He had been ploughing these fields for the last three years and one day before the occurrence accused Abdul Karim asked her husband not to plough his field but her husband refused to do so. This enraged the accused and they threatened to teach him a lesson next day if he attempted to plough the field. Her husband did not care for it and challenged them to stop him if they had any courage to do so. On the date of occurrence in the early morning her husband had gone to plough the field with bullocks and plough and at about 7 A.M. the complainant and her son Mukhtar were going to provide him food there and when they reached near the field, they

E

F

G

H

saw the accused Salim (A3) armed with an iron rod, Abdul Hamid (A-2) armed with a spade and Abdul Karim (A-1) armed with a 'Kassi' proceeding towards their field hurling abuses at her husband and they started belabouring him with arms and their hands and injured him. He fell down on the ground. They kept on beating him there. Hearing shrieks of the complainant and her husband, her brother Chhotey who had come there for call of nature appeared there and several other co-villagers also arrived there and on their challenge the accused left the place running towards forest considering that her husband was dead. Later on she arranged for a charpai from the village and after keeping the injured thereon proceeded towards the police station in company of Rafiq, Rashid Alauddin, Munshi, Abdul Samad and reaching near village Etaua. On the way her husband breathed his last and then she had gone to the police station and lodged report at about 11.00 A.M. on the same day.

Head Moharrir Jagdish Singh prepared check report and G.D. report (Ex. Ka.3) on the basis of oral information of the complainant in presence of S.I. D.D. Agarwal (PW.5) who took up the investigation immediately. He interrogated the complainant and then prepared inquest report, challan and photo of the Corpse (Ex. Ka. 4 to Ka. 6) and sealed the corpse and entrusted the same to constables for onward transmission to the hospital for postmortem examination alongwith necessary papers. He also prepared recovery memo (Ex. Ka. 7) for the blood stained Chadar covering the corpse. Later on he went to the place of occurrence and prepared site plan (Ex. Ka. 8) after inspecting the spot. He took sample and blood stained earth and sealed the same in separate containers (Ex. 1 and 2) after preparing recovery memo (Ex. Ka. 9). Later on other witnesses were also interrogated and after concluding the investigation he submitted the charge-sheet against the accused. The accused kept on absconding and surrendered to the court later on. He proved statement of Smt. Mango recorded under section 161 of the Code of Criminal Procedure, 1973 (in short the 'Code') vide Ex. Ka. 12 during trial.

Dr. I.S. Tomar (PW.4) carried on postmortem examination of the corpse of the deceased on 13-4-1978 at about 3.15 P.M. and he found that the deceased was aged about 40 years and his death occurred within 1¼ days. He was average built and *rigor mortis* was present in the lower limbs whereas it passed of the upper limbs. He found following ante-mortem injuries on his person:

1. Lacerated wound 2.5 cm x .5 cm x scalp deep over left side head 9 cm above left ear, placed obliquely.

- A** 2. Lacerated wound 2 cm x 5 cm. X scalp deep over right side head 7 cm above right ear, placed obliquely.
3. Lacerated wound 3 cm x 1 cm. X scalp deep over top of head in middle, placed obliquely.
- B** 4. Multiple clotted contusions in an area of 24 cm x 4 cm over outer aspect of right arm from upper to lower end.
5. Abraded contusion 3 cm x 2 cm over back of right elbow.
6. Contusion 4 cm x 3 cm over dorsum of right hand.
- C** 7. Multiple abraded contusion in area of 6 cm x 1.7 cm over of left shoulder.
8. Multiple abraded contusions in an area of 25 cm x 8 cm over back and anterior aspect of left arm, from shoulder to elbow.
- D** 9. Two lacerated wounds—one 3 cm x 5 cm x 6 cm deep and other 2 cm x 5 cm x bone deep over back of left forearm in upper third.
10. Abraded contusion 10 cm x 4 cm area over back of left forearm.
11. Contusion 6 cm x 4 cm over dorsum of left hand and left ring finger is fractured.
- E** 12. Multiple contusions in an area of 36 cm x 11 cm over outer aspect of left thigh and left buttock placed parallel to each other and two parallel lines in every contusion.
- F** 13. Multiple lacerated wounds in an area of 21 cm x 5 cm x bone deep over front of left leg.
14. Lacerated wound 1 cm x 1 cm x 6 cm deep outer aspect of left knee.
15. Multiple contusions in an area of 6 cm x 2 cm over back of leg in upper third.
- G** 16. Lacerated wound 4 cm x 1.5 cm x bone deep over front of right leg in middle and both bones are fractured.
17. Contusion 4 cm x 3 cm over outer aspect of right knee.
- H** 18. Contusion 2 cm x 1 cm right side chest 9 cm from nipple at 5 'o'

clock position.

A

19. Multiple contusions in an area of 43 cm x 26 cm over whole of back from shoulder to waist placed parallel and obliquely. Two parallel lines seen in every contusion.

4. On internal examination, he found parietal bone and axillary bone fractured and brain and membrane congested. Blood present around the membrane. Heart was full on right side with blood whereas it was empty on left side. Stomach and small intestines were empty whereas large intestine was half full. Death was due to shock and haemorrhage resulted through antemortem injuries. He proved postmortem examination report Ex. Ka. 1 and he had sent the same alongwith blood stained shirts and underwear of the deceased in a sealed packet to the Investigating Officer. In his opinion the injuries and death of the deceased was possible at 12-4-1978 at about 7-8 A.M. through iron rod, spade and Kassi.

B

5. After the investigation was completed charge sheet was filed. But the accused persons pleaded innocence and claimed to be tried. Five witnesses were examined to further the prosecution version. Smt. Mango (PW-1) widow of the deceased, Chhotey (PW-2) brother of wife of the deceased and Mukhtar Ahmad (PW-3) son of the deceased were stated to be eye witnesses. The trial Court found the evidence of PWs 1, 2 and 3 to be credible and cogent and convicted the respondents as afore-stated.

C

D

E

6. In appeal, the High Court analysed the evidence to hold that the prosecution has failed to establish its accusations. Accordingly, the judgment of acquittal was passed.

7. In support of the appeal, learned counsel for the appellant-State submitted that the evidence of PWs 1, 2 and 3 leaves no manner of doubt that the respondents were the assailants and the trial Court had rightly convicted them.

F

8. Learned counsel for the respondents on the other hand supported the judgment of acquittal.

G

9. As rightly noted by the High Court the fate of the case depends on the acceptability of the evidence of PWs 1, 2 and 3. PW-1 partially resiled from her statement made during investigation. According to her, she saw the assailants from a distance of one mile. Sugarcanes were standing in the field

H

A which intervened between the place where she was and the field where the incident occurred. She accepted that she had not herself seen the assault but saw the accused persons while they were making their escape towards the jungle. As noted above, she claimed to have seen them running from a distance of one mile. She further admitted that in between the village and her field the number of fields were situated where sugarcane and wheat crops were standing.

B
10. PW-2 stated that he had also seen the accused persons committing the assaults. But in the cross examination he admitted that he had come to the place when the assault was over and he had seen the accused persons running towards the jungle in the sugarcane field. He accepted that he was with PW 1.

C
11. PW-3 was a child of 9 years at the time of incident. He also admitted to have seen the accused persons running away with their backs towards him standing near his mother.

D
12. The evidence of PWs 1, 2 and 3 clearly indicated that they were far away from the field where the alleged incident took place. The High Court noted that identification was practically impossible from such a large distance particularly when the field was obstructed by standing crops of sugarcane which were not less than 6-7 ft in height. The High Court therefore rightly observed that they could not have seen the assaults not only because of the distance but because of the presence of heights of crops of sugarcane. Additionally, though all the witnesses stated that the accused persons were carrying sharp cutting weapons and rods, not even one injury was an incised one. All the injuries were either lacerated wounds or contusion.

E
F
13. In view of the total discrepant nature of the evidence the High Court has rightly discarded the prosecution version and set aside the conviction. We find no reason to interfere with the conclusions of the High Court. The appeal fails and is dismissed accordingly.

G B.B.B.

Appeal dismissed.