

Manzoor

Vs

State of Uttar Pradesh

And Suleman

Vs

State of Uttar Pradesh

Criminal Appeals Nos. 211 and 212 of 1980

(E. S. Venkataramiayh, A. Varadarajan JJ)

15.02.1982

JUDGMENT

VARADARAJAN, J. –

1. These criminal appeals by special leave are by Manzoor alias Babu and Suleman against the common judgment of a Division Bench of the Allahabad High Court in Criminal Appeals Nos. 1288 of 1979 and 1290 of 1979, confirming the conviction of Manzoor under Section 302 read with Section 34, IPC, and of Suleman under Section 302, IPC and the sentence of imprisonment for life awarded to them by the learned Sessions Judge, Saharanpur in S.T. No. 414 of 1979 for the murder of one Gul Bahar at about midnight in the night of September 22/23, 1978.

2. The case of the prosecution was this : The appellants Manzoor and Suleman and the deceased, Gul Bahar, and Yasin (PW 3) and Zinda Hasan (PW 4) are residents of Ambehta. The appellants are cousins being sons of two sisters. The deceased Gul Bahar's maternal uncle's daughter is married to the appellant Suleman. Yasin (PW 3) is the maternal uncle of Suleman. There was an exchange of hot words between the appellant Manzoor and deceased Gul Bahar as a consequence of the latter being seen in a house with the sister of the former, and Manzoor's brother Noora also threatened the deceased in that connection. Suleman and Noora were arrested in connection with a dacoity case and they suspected that Gul Bahar had given information leading to their arrest. There was gughal mela in September 1978. Zinda Hasan (PW 4) had come to the mela for working as a rickshaw-puller, and the deceased Gul Bahar and Yasin (PW 3) came to the mela two days before the occurrence in this case for working in the mela and they stayed with PW 4. Both the appellants went to the place where PWs 3 and 4 and the deceased Gul Bahar were staying at about 8 p.m. on September 22, 1978 and asked Gul Bahar to take them to a cinema, and after Gul Bahar told them that he had no money they remained with him until 11 p.m. Thereafter, they took the deceased Gul Bahar and Yasin (PW 3) to the mela where all of them remained for about an hour. Then the appellant Suleman told the deceased Gul Bahar that he wanted to go for easing himself. There-upon, both the appellants and the deceased Gul Bahar left the mela and went near a lime kiln situate near a railway line at about 11.45 p.m., leaving Yasin (PW 3) at the mela itself. After a train had passed by, the appellant Manzoor asked the appellant Suleman to kill Gul Bahar for having got him (Suleman) and Noora arrested in the dacoity case. Thereupon, the appellant Suleman fired from a country-

made pistol and caused an injury on the abdomen of Gul Bahar who snatched the towel (Ex. 1) from the assailant's shoulders. The homeguards Balwant Singh, Chaman Lal, Anil Kumar (PW 1) and Yogesh Kumar (PW 2) were going near the scene of occurrence while on patrol duty at the time of the occurrence. On hearing the alarm of the deceased Gul Bahar those four homeguards flashed their torches and rushed towards the scene of occurrence and saw two persons running away. The deceased Gul Bahar told Anil Kumar (PW 1) and Yogesh Kumar (PW 2) that he was shot by Suleman after he had been caught by Manzoor. He told the homeguards that he would not survive and requested them to record his statement. He wrapped the towel (Ex. 1) around his waist and was brought by the homeguards to a nearby petrol-pump where his statement (Ex. Ka-1) was recorded by Anil Kumar (PW 1) as narrated by him. He was, thereafter, taken from there in a rickshaw to the Mandi Police Station where he lodged his report at 0.20 a.m. on September 23, 1978.

3. The injured Gul Bahar was sent from the Mandi Police Station with a police constable to the District Hospital, Saharanpur where he was examined by the Doctor at 1.15 a.m. on September 23, 1978. Gul Bahar died at 12.30 p.m. on that day. Dr. Ramesh Chand Bedi (PW 5) conducted autopsy on the body of the deceased and found a gunshot wound on the left side on the abdomen with lacerated and inverted margins and a small portion of the small intestines protruding through the wound. Two lower ribs on the left side of the chest were found fractured. The left side of the liver, small intestines and spleen were found lacerated. Pellets were seen in the liver, stomach, peritoneum, spleen and abdomen. Dr. Bedi (PW 5) opined that death was due to shock and haemorrhage as a result of the gunshot injury and that the injury is sufficient in the ordinary course of nature to cause death.

4. Both the appellants returned to Ambehta on the next day after the occurrence and went to the house of the timber merchant Sharif Ahmed (PW 11) at about 5 p.m. on that day and told him that the deceased Gul Bahar had been harassing them and got Suleman and Noora arrested in a dacoity case. The appellant Manzoor told PW 11 that the deceased got him also arrested in a theft case. The appellant Suleman told PW 11 that he and Manzoor took the deceased to the mela and then to the lime kiln under the pretext that Suleman wanted to ease himself, that he shot the deceased who had been caught hold of by Manzoor, that four persons in police uniform came there and that both of them ran away from there after leaving his towel at the place. Both the appellants requested PW 11 to use his influence with the police and help them after getting them arrested. PW 11 who was suffering from a boil, told one Chote about the confession of the appellants and asked Chote who had remarried the deceased Gul Bahar's mother, to inform the police about the confession.

5. The Investigation Officer (PW 12) recorded the statement (Ex. Ka-11) of the victim Gul Bahar in the emergency ward of the hospital at Saharanpur. In that statement the victim gave a detailed account of the incident.

6. The appellant Suleman who was on bail in the dacoity case surrendered in the court on September 29, 1978 and got his bail cancelled. The appellant Manzoor was arrested at about 2.10 a.m. on October 4, 1978 at Badgaon. Both the appellants who were sent to the jail without covering were put up for identification in the District Jail, Saharanpur on November 17, 1978 by the homeguards and they were identified by the homeguard (PW 2) alone and not by the other three homeguards.

7. Both the appellants admitted that they are related to each other as cousins and that they and the deceased Gul Bahar and PWs 3 and 4 (Yasin and Zinda Hasan) belong to Ambehta and that Suleman and Manzoor's brother Noora were arrested in a dacoity case. They denied that they suspected the deceased Gul Bahar as the informer in connection with the arrest of Suleman and

Noora. Manzoor denied that his sister was found in a house along with deceased Gul Bahar and that there was any exchange of hot words on any such account or threat to the deceased by Noora. They denied the other circumstances appearing against them in the evidence. Suleman admitted that he appeared in the court on September 29, 1978 in the dacoity case and was sent to the jail. Both the appellants stated that they were shown to PW 2 before the identification parade was held and that they have been falsely implicated in this case on account of party faction in the village.

8. The learned Sessions Judge rejected the dying declaration (Ex P-11) recorded by the Investigation Officer (PW 12) at the hospital on the ground that it is unsafe to be relied upon having regard to its length and details and the physical condition of the deceased Gul Bahar who is alleged to have made that statement. The medical evidence shows that the condition of Gul Bahar in the hospital at the time when he is alleged to have made that statement was such that he could not have had the physical capacity and the mental alertness to make that long statement. But he accepted the evidence of PWs 3 and 4 about the presence of the appellants at the place of PW 3 near the mela along with the deceased and PW 4 and the evidence of PW 3 about the presence of the appellants and the deceased in the mela sometime before the occurrence in this case, the evidence of the homeguards PWs 1 and 2 about what the deceased is alleged to have told them soon after the occurrence about Suleman firing at him when he was being held by Manzoor near the lime kiln as narrated in Ex. Ka-1, the identification of the appellants by PW 2 in the Central Jail at Saharanpur in the identification parade held on November 17, 1978 and the evidence of Sharif Ahmed (PW 11) regarding the alleged extrajudicial confession of the appellants and found Suleman guilty under Section 302, IPC and Manzoor guilty under Section 302 read with Section 34, IPC and convicted them accordingly and sentenced them to imprisonment for life as mentioned above. The learned Judges of the High Court on the same evidence confirmed the conviction of the appellants and the sentence awarded to them by the learned Sessions Judge and dismissed the appeals.

9. We could not have the benefit of any assistance from the appellants' counsel Mr M.T. Siddiqui who was not present. We heard Mr R.K. Bhatt, learned counsel for the respondent State and were taken through the judgments of the courts below. We have perused the available records and are, however, unable to agree with the courts below that the prosecution has proved the guilt of the appellants beyond all reasonable doubts.

10. The learned Sessions Judge has not rightly relied upon the dying declaration (Ex. Ka-11) which is stated to have been recorded as a statement of the deceased Gul Bahar by the Investigation Officer (PW 12) in the Emergency Ward of the District Hospital, Saharanpur. The medical evidence shows that the deceased Gul Bahar could not have been in a fit physical and mental state to make such a long and detailed statement at the relevant time. Therefore, Ex. Ka-11 has to be eschewed from the evidence.

11. The courts below have accepted the evidence of Yasin (PW 3) and Zinda Hasan (PW 4) that the appellants went to the place where the rickshaw-puller (PW 4) was staying near the mela at about 8 p.m. on September 22, 1978, he having gone there for eking out his livelihood as a rickshaw-puller and that they left that place for the mela along with the deceased and PW 3 who is stated to be the uncle of the deceased Gul Bahar. PW 3 is stated to have gone to PW 4's place near the mela two days before the occurrence for working in the mela, evidently as a labourer. The evidence of PW 3 who is related to the deceased and of PW 4 who appears to be a friend of PW 3 cannot be said to be disinterested. Therefore, their evidence has to be weighed with caution. We are not impressed with the evidence of PWs 3 and 4. If PW 3 had gone with the deceased to the mela from the place where PW 4 is stated to have been staying it is not known why he did not accompany the deceased when

he is said to have gone along with the appellants on the representation of one of them that he wanted to move out of the mela for easing himself. We are of the opinion that it is not safe to rely upon the interested evidence of PWs 3 and 4.

12. There is then the evidence of PWs 1 and 2, the homeguards of whom only PW 2 had identified the appellants in the identification parade held on November 17, 1978. The four homeguards including PWs 1 and 2 are stated to have flashed their torchlights and to have seen the two persons running away from the scene of occurrence after they had heard the alarm of the injured Gul Bahar near the railway line. The torches have not been produced in evidence, and the Investigating Officer (PW 12) would say in his evidence that he saw those torches and returned them to the homeguards. It is not known why the Investigating Officer (PW 12) thought it fit to return the torches with the aid of which the homeguards are stated to have seen the two persons running away from the scene of occurrence though that will be a relevant piece of material evidence in the case. PW 12 has stated that after recording the statement (Ex. Ka-11) of the deceased Gul Bahar at the District Hospital, Saharanpur he went to the mela and recorded the statements of the four homeguards. This evidence of PW 12 shows two things, namely (1) that the homeguards would have been on duty at the mela in the night of September 22/23, 1978 and could not have been on patrol duty, moving about near the railway line or the lime kiln which is stated by PW 12 to be situate one furlong away from the mela, as PWs 1 and 2 would have it, and (2) that none of the homeguards could have accompanied the injured Gul Bahar from the petrol pump where the First Information Report (Ex. Ka-1) is stated to have been recorded to the police station, for if any homeguard had accompanied the injured Gul Bahar to the police station he would have been examined by the police at the police station itself in connection with this case and it would not have been necessary for PW 12 to have examined that homeguard only at the mela. The evidence of PWs 1 and 2 that Ex. Ka-1 was recorded at the petrol pump is not reliable, for it is stated in Ex. Ka-1 that one of the homeguards took down the deceased's statement and brought him to the police station after recording the report. From the statement in Ex. Ka-1 that one of the homeguards brought the deceased to the police station, it would appear that Ex. Ka-1 could have been written only after the injured Gul Bahar had been taken to the police station and not earlier. It is to be noted that none from the petrol-pump and the rickshaw-puller who is stated to have carried the injured Gul Bahar from the petrol-pump to the police station has been examined as a witness at the trial. It is seen from the evidence of PW 12 that the homeguards did not give him the description of any of the culprits when he examined them and that he did not even ask them about it though it is stated in the report Ex. Ka-1 that the homeguards had seen the culprits thoroughly and identified them. If at the earliest opportunity the homeguards did not mention any identifying features of the culprits when they were examined by PW 12, it is difficult for us to believe how PW 2 could have identified both the appellants nearly two months later on November 17, 1978. It has to be noted that the appellants have stated in the trial court that they were shown to the witnesses before the identification parade was held. In these circumstances we are not impressed with the evidence of PWs 1 and 2.

13. Then we have the evidence of the timber merchant Sharif Ahmed (PW 11) about the alleged extrajudicial confession of the appellants. There is nothing on record to show that the appellants had any reason to take PW 11 into confidence and believe that he could save them from the trouble after getting them arrested if they confessed their guilt to him. We are not impressed with the evidence of PW 11 that the appellants made the extrajudicial confession to him. The statement Ex. Ka-1 purporting to have been made by the deceased is artificial, for it is not probable that one of the appellants would have been holding the deceased man Gul Bahar when the other shot him with the country-made pistol from which a very large number of pellets had gone into the body of the deceased. It is doubtful whether the deceased who had characterised the appellants as dacoits in Ex.

Ka-1, would have gone in the company of the appellants in view of the case of the prosecution itself that there was trouble between the deceased on the one hand and Manzoor and the latter's brother Noora on the other, especially when it is the case of the prosecution that Noora had threatened the deceased with dire consequences and the appellant Suleman and Noora are stated to have suspected that the deceased was responsible for their apprehension in the dacoity case. In these circumstances, we are of the opinion that the prosecution has not proved the guilt of the appellants satisfactorily beyond all reasonable doubt. We, therefore, allow the appeal and set aside the conviction of the appellants and the sentence awarded to them and direct them to be set at liberty forthwith.

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