

**SUPREME COURT OF INDIA**

Om Prakash

Vs.

State of U.P.

CrI.A.No.1022 of 2004

(S.B. Sinha and Cyriac Joseph JJ.)

12.12.2008

**JUDGMENT**

**S.B. Sinha, J.**

1. This appeal is directed against a judgment and order dated 14.5.2004 passed by the High Court of Judicature at Allahabad in Criminal Appeal No. 1472 of 1981 whereby and whereunder the appeal preferred by the appellant herein against a judgment of conviction and sentence dated 30.6.1981 passed by Sri R.K. Mishra, III Additional Sessions Judge, Shahjahanpur in Sessions Trial No. 418 of 1980 holding that the appellant was guilty for commission of offences under Sections 148, 452 and 302 read with Section 149 of the Indian Penal Code and sentencing him to undergo rigorous imprisonment for 18 months, 18 months and life imprisonment respectively, was dismissed.

2. Appellant was prosecuted in respect of commission of offences, the incident whereof took place on or about 15.8.1979 at about 9.30 p.m. in the house of one Mewa Ram. Janamashtami festival was being celebrated on that night. Dinesh Kumar and Girish Kumar, the sons of the informant Mewa Ram, Smt. Ramlali, his wife, son Ram Rakshapal, the deceased and his wife Smt. Neha were busy in offering puja to the deity. Allegedly, Dinesh Kumar, Ram Rakshpal, Ram Pal and Girish Kumar, sons of Mewa Ram were found guilty for commission of an offence under Section 307 wherefor Ram Shanker son of Chhotey Lal (accused No. 1) had lodged a First Information Report (FIR). All the four sons of the informant preferred an appeal against the said judgment of conviction and were released on bail. Admittedly, there existed a dispute with regard to a house property between Shri Krishna, father of Pappu (accused No. 7) on the one hand, and the informant as well as his four sons on the other, wherefor a proceedings under Section 107 of the Code of Criminal Procedure had been initiated.

3. Before advertng to the details of the prosecution case, we may notice the inter se relationship amongst the accused. Accused Ram Shanker and Ram Bharose were real brothers; accused Dharmandera was son of Ram Shanker and others were family members or relatives of Ram Shanker. Appellant before us was not concerned with the aforementioned

dispute. We may furthermore notice that whereas all the 7 accused had been found guilty of commission of the offence of murder of Ram Rakshapal (deceased), son of Mewa Ram by the learned trial judge, the High Court had found the appellant only guilty of firing of a shot at the deceased, opining that participation of other accused in the commission of the said offence was not proved beyond doubt. We may furthermore notice that during pendency of the appeal before the High Court Ram Bharose son of Chhotey Lal and Ram Shanker, son of Rudra Prasad expired.

4. The First Information Report, as noticed above, was lodged by Mewa Ram (P.W.1) on 16.8.1979, stating:-

"This is to bring to your kind notice that approximately four years ago Rama Shankar s/o Chotte Lal Brahman lodged a criminal case u/s 306 against my son Dinesh Kumar, Ram Rakshapal, Rampal and Girish Kumar in which matter the four were convicted. They were released on bail by the High Court. Ever since Rama Shankar and his son Dharmendra and Ram Bharose and Om Prakash s/o Ramchandrar and Satish s/o Rameshwar and Ram Shankar s/o Rudraprasad and Pappu alias Suresh s/o Sri Krishna were seeking revenge. Sri Krishna also involved us in the matter of partition of house under 107 which took place in the court of Pargandhibari, Tilhar. This further aggravated the enmity, so that tonight around half past nine when I was sitting on the cot in front of the door under the roof while my son Dinesh Kumar, Shashi Kumar, my wife Ramlali and my son Ramrakeshpal and his wife Neha were performing Janamashtami puja in the 2 kitchens, then Om Prakash, Ram Bharose each carrying their licensed guns and Dharmendra and Satish carrying small guns (tamancha) and Pappu alias Suresh and Ramashankar carrying guns in their hands entered my house from the eastern gate on which doors were not attached. Near the thatched roof a lantern was alight and in front of Girish Kumar's room a kerosene wick box was burning. On hearing the foot steps of above named accused I inquired. On my query my son Ram Rakshpal came out from kitchen and Om Prakash instantly fired at my son from his gun. I and my family raised alarm. On hearing the shouts my nephew Ishwar Chand and Suraj Prasad came to the roof carrying a battery. They saw under the power of the torch that Rambharose and Dharmendra, Satish, Ramshankar, Pappu alias Suresh and Ramshankar also fired at my son Ram Rakshapal from their guns and small guns (tamancha). My son received gun shots and he fell down there only. My son Dinesh Kumar, Shashi Kumar, my wife Ramlali, Neha w/o Ram Rakshpal and my nephew Ishwar Chand and Suraj Prasad also saw these people under the light of torch, Lantern and kerosene box wick and clearly recognized them. After the accused ran away from the eastern side we went and saw and found that Ram Rakshpal had died. I could not care to report the incident because of the fear of the accused. Now I came to lodge the report written by my brother. Report be registered and legal action be taken now. Because of rain the corpse of Ram Rakshpal was removed from the courtyard to the roof."

5. There exists a controversy as to whether the said report was lodged at 4.45 a.m. or 4.45 p.m. on 16.8.1979. Typed copies of the FIR, however, show that it was lodged at 4.45 p.m.

and not at 4.45 a.m. We may also notice that the Investigating Officer while lodging the FIR stated that the same had been lodged at 9.30 p.m. on 16.8.1979. Admittedly, the FIR was sent to the court of Chief Judicial Magistrate only on 17.8.1979. Neither any inquest report nor any seizure memo had been proved. The documents relating to post-mortem examination of the dead body was received by the Autopsy Surgeon at about 10.45 a.m. on 17.8.1979. The dead body, however, was received at about 2.20 p.m. on that day and post-mortem was conducted at 2.30 p.m. Interestingly, the death, according to the Doctor, is said to have taken place 3-4 days prior to the post-mortem examination. In the said report, it was stated:

"Average age built body Eyes closed, Mouth half open, Abdomen scrotum and Penis distended Blister present at places skin peeling off at places. Rigor Mortis passed off from both upper extremities but slightly present in lower extremities."

6. The FIR was scribed by one Ganga Sahai. He was brother of Mewa Ram. He was, however, not ordinarily a resident of village Parawnia where the incident took place but was a resident of Tilhar.

7. The manner in which the incident had taken place was noticed by the High Court, which is reads as under:

"Dinesh Kumar and Girish Kumar sons of Mewa Ram, Smt. Ramlali, wife of Mewa Ram, Ram Rakshapal son of Mewa Ram and Smt. Neha wife of Ram Rakshapal were busy in worship; Om Prakash and Ram Bharosey armed with their licensed guns; Dharmendra, Satish and Ram Shanker sons of Shhotey Lal armed with country made pistols and Pappu alias Suresh and Ram Shanker son of Rudra Prasad armed with guns entered into the house of the informant through eastern side where there was no gate. Lantern and Dhibari were glowing. When Mewa Ram, informant objected to it his son Ram Rakshpal came out of the kitchen. Om Prakash fired on him and the shot hit him (Ram Rakshpal). Thereafter, other accused also fired and Ram Rakshpal fell down on the spot. When alarm was raised by Mewa Ram, his nephews Ishwar Chand and Suraj Pal PW2 with their torches reached the roof and saw the accused persons inside the house of the informant. After committing the crime, the accused persons made their escape good. Mewa Ram went near his son Ram Rakshpal and found his son to be dead. Due to fear, Mewa Ram could not proceed immediately to the police station, which was at the distance of about four miles from the village. He ultimately got FIR scribed from one Ram Sahai resident of the same village and lodged it at police station Jaitipur on 16.8.1979 at 4.45 A.M. against the appellants."

8. The prosecution in support of its case, inter alia, relied upon the evidence of Mewa Ram (PW-1), Surajpal son of Ganga Singh (PW-2), and Dinesh Kumar, son of Mewa Ram (PW-4). Mewa Ram (PW-1) in his examination-in-chief reiterated the averments made in the FIR. We may, however, notice that according to him Om Prakash and Ram Bharose had licensed guns and all others were having country-made pistols. Whereas Om Prakash was said to have fired from a distance of 4-5 paces, other accused allegedly fired from a distance of 2-3 paces only. PW-1 was supported by the other prosecution witnesses.

We may also notice that in the post-mortem report, the following ante-mortem injuries were found.

"1. Gunshot wound of entry 0.5 cm x 0.5 cm x bone deep on right side face 0.5 cm in front of tragus Rt. ear. No blackening around wound present. Margins inverted. Direction from the Rt. side ramus & Rt. Mandible fractured.

2. Gunshot wound of entry 0.5 cm x 0.5 cm x muscle deep on Rt. side neck 4 cm below Rt. Angle of Jaw Direction from right back to left. Margins inverted. No blackening or charring present.

3. Gunshot wound of entry 0.5 cm x 0.5 cm x chest cavity deep through and through Rt. Side chest 8 cm. Above Rt. nipple at 11'O Clock in position from nipple.

4. Gunshot wound of exit 1 cm x 2 cm x cavity deep through & through communicating injury No.3 on back of Rt. Shoulder, 9 cm below tip of Rt. shoulder posteriorly. Margins everted."

9. Dr. M.L. Tandon, Autopsy Surgeon who was examined before the learned trial judge as PW-6 stated that there were three wounds of entry, whose size and direction were same. He furthermore opined that injuries caused to the deceased were only possible if shots had been fired from his right side. He furthermore was of the opinion that the duration of time of death may vary by about 6 hours. We have noticed hereinbefore that according to the post-mortem report, Blister was found to be present at places and skin was also peeled off at places. Rigor Mortis passed off from both upper extremities but slightly present in lower extremities.

10. On the date of occurrence, according to the prosecution witnesses, it was raining and the dead body was kept under the Chappar. The prosecution failed to obtain an explanation from the Autopsy Surgeon as to how he had opined that death had taken place 3-4 days prior to his post-mortem examination although he examined the dead body within 41 hours from the time of occurrence.

11. It is furthermore evident that all the prosecution witnesses stated that all the accused persons had fired from the respective firearms. According to them at least 7 shots were fired; 3 shots had hit the person of the deceased. If that be so, more than one gun must have been used. Appellant, as noticed hereinbefore, is said to have been fired a shot from his licensed gun. Its use, however, has not been established by the prosecution as the report of the ballistic expert is silent in that regard. The empties which were found at the spot had not been examined by any ballistic expert. The empties which were recovered from the dead body were not matched with the gun allegedly used.

"We may notice that two metallic pellets were recovered from the dead body. Empties had not been shown to the expert; even the attention of the Autopsy Surgeon was not drawn thereto. Although shots were said to have been fired from a distance of 2-3

paces, no blackening or charring was found to be present. If the shots were fired from a close range, it was expected that blackening and charring would have been noticed by the Autopsy Surgeon at the entry point.”

12. Learned Sessions Judge and the High Court, with respect, failed to apply their mind as regards the time of lodging of the FIR. Hirdey Narain Shukla, the Head Constable attached with Police Station who was examined as PW-3 before the learned trial judge stated that the FIR was lodged at 4.45 a.m. and he had recorded the same immediately. According to him, the special reports were sent by 6.00 a.m. through a constable. However, the Investigating Officer did not say so. As we have noticed hereinbefore, he, in his evidence, categorically stated that he had recorded the FIR at 9.30 p.m. No evidence had been brought on records to show that investigation had started on 16.8.1979. A site plan was prepared but it does not bear any date. The prosecution has not explained as to why the FIR was sent to the court of Chief Judicial Magistrate on 17.8.1979 and why the dead body was not sent for post-mortem on 16.8.1979 itself.

13. The High Court, in our opinion, committed a serious error insofar as it proceeded on the basis that shots fired by the appellant caused the fatal injury. The High Court did not analyze the evidence on record as to who caused the other firearm injuries. If the prosecution witnesses, who were said to be the eye-witnesses, were to be believed, 6 out of 7 accused could not have been acquitted and particularly those who had direct enmity with Mewa Ram and his sons. Although Suraj Pal (PW-2) son of Ganga Singh denied the suggestion that scribe of the FIR who was admittedly a resident of different village (said to be at a distance of 10 kilometers) from the place of occurrence, the prosecution had not explained as to why he was not examined. If he was present in the village it was expected that he also had witnessed the occurrence, as his son was said to be an eye-witness. It is difficult to believe that in a case of this nature the investigation did not start immediately. Inquest report, preparation of seizure memo etc. which were to be carried routinely, and as such there was no reason as to why they were not brought on record.

14. While examining the original records of the case, we have noticed that some interpolations have made in the records maintained at the police station. The High Court, in our opinion, committed a serious error in drawing an inference that appellant had rightly been held guilty for commission of offence of murder of Ram Rakshpal as animosity between the parties was proved. It failed to notice that there is nothing on record to show that the appellant had been bearing any animosity against the deceased. On the other hand, other accused were having animosity towards the deceased, Mewa Ram and his family.

Furthermore, the High Court did not pose unto itself the correct question, namely, the time of lodging the FIR, i.e., whether it had in fact been lodged at 4.45 a.m. or 4.45 p.m.. If it was lodged at 4.45 p.m., the entire edifice of the prosecution case would fall to the ground.

15. Delay in lodging the First Information Report has a great importance in a case of this nature. Enmity between the parties stands admitted. The prosecution case proceeded on the basis that immediately after occurrence and after shifting the dead body under a shed, the

informant got the First Information Report scribed by Ganga Sahai and immediately thereafter proceeded on foot to the Police Station. If this part of the story is correct, the prosecution's case would not be subject to much doubt. But if the scribe of the First Information Report was residing in a separate village which is 10 kms. away from the place of occurrence, and it was at that place the FIR was scribed whereafter PW1 arrived at the Police Station, it would impossible for him to reach by 4.30 in the morning. The prosecution did not examine the scribe of the First Information Report although his son has been examined as an eye-witness. If he was residing at the relevant time in the village where the incident had taken place, it was expected that either he had witnessed the occurrence or had reached the place of occurrence immediately after the accused fled away. The prosecution, therefore, should have made attempts to clarify this anomaly.

“Indisputably, there exists a discrepancy as regards timing of the lodging of the First Information Report. P.W.3, Head Constable Hriday Narain Shukla, testified that it was lodged at 4.45 a.m. Records, however, show otherwise. In the FIR, it is shown to have been lodged at 4.45 p.m. As noticed hereinbefore, there are some interpolations but according to the Investigating Officer, he recorded the First Information Report at 9.30 p.m. on 16.8.1979.”

16. Moreover, if the First Information Report was lodged early in the morning, there was absolutely no reason as to why the investigation did not start immediately thereafter. If Head Constable Hriday Narain Shukla is correct that the copies of the First Information Report had been sent to all concerned including the court, there was absolutely no reason as to why the same would reach the court on the next date. We also fail to comprehend as to why the dead body was sent for post mortem only on 17th instead of 15<sup>th</sup> itself. The seizure memo does not contain any date. The original inquest report is not on record.

17. Furthermore, except the appellant all other accused have been acquitted. The High Court, therefore, did not rely upon the prosecution case in its entirety. While doing so, unfortunately, the High Court did not consider these vital aspects of the matter which were crucial for determination of the issue.

18. For the aforementioned reasons, the impugned judgment of the High Court cannot be sustained and it is set aside accordingly. The appeal is allowed. The Appellant who is in custody is directed to be set at liberty unless wanted in connection with any other case.