SUPREME COURT OF INDIA

State of U.P.

Vs.

Hari Chand

Crl.A.No.1221 of 2004

(Dr. Arijit Pasayat and Asok Kumar Ganguly JJ.)

29.04.2009

JUDGMENT

Dr.Arijit Pasayat, J.

1. Challenge in this appeal is to the judgment of a Division Bench of the Allahabad High Court directing acquittal of the respondents. Two respondents along with two others faced trial for alleged commission of offence punishable under Section 302 of the *Indian Penal Code, 1860* (in short `IPC'). Co-accused persons were acquitted by the trial Court.

2. Prosecution version in a nutshell is as follows: On 23.9.1979, at about 11 O'clock in the night in village Fattupatti, Police Station Gambheerpur, District Azamgarh, the incident took place. The deceased was one Mool Chand, who is described as deceased hereinafter. The FIR was lodged the following day at 7.10 a.m. by Khelawan (PW.3) at whose house the deceased was allegedly sleeping on the fateful night. The distance of the police station from the place of occurrence was five miles. Deceased resided in the village aforesaid with his mother and other family members. The accused Jautam alias Andhi had property disputes with the deceased. Accused Har Chand was allegedly his associate residing in the same village. Earlier to the incident, deceased had obtained a decree relating to certain disputed property in his favour as against Jautam alias Andhi, a notorious person who had infused a sense of terror in the mind of Mool Chand and used to issue threats to him of his life. For this reason, Mool Chand used to sleep at the house of Khelawan (PW. 3). On the fateful night, he was sleeping outside the house of Khelawan (PW.3). At a little distance his mother Gomati Devi (PW.1) and his daughter Ramawati (PW 2) were also sleeping in the Verandah. A lantern was glowing. At about 11 O'clock in the night, the two respondents with two others appeared there**.** Both the respondents were armed with firearms. Mool Chand was caught hold of and present two respondents opened fire on him. He died instantaneously. Gomati Devi (PW.1), Ramawati (PW.2) and Khelawan (PW.3) witnessed the incident. On the lodging of the FIR on oral narration by Khelawan (PW.3), a case was registered and investigation was taken up.

3. After completion of investigation charge sheet was filed. The defence plea was one of the denial and alleged false implication. Prosecution primary relied on the evidence of three eye-witnesses PWs 1, 2 and 3. PW.5 was the doctor who conducted the autopsy.

4. The High Court by a practically non-reasoned order directed acquittal. The appeal filed by the respondents was allowed after referring to the evidence of the eye witnesses by concluding as follows: "Obviously, night was chosen as time for commission of crime by the culprit (s). Two of them (present appellants) allegedly used firearms. It is against inherent probabilities of the situation that two of the associates of the present appellants would have picked him up from cot, taken him to some distance and would have then thrown him on the ground before firing was resorted to by the present two appellants. The natural and probable conduct of the appellants holding firearms would have been to shoot him dead immediately on locating him sleeping on the cot. There could hardly by any necessity of his first being picked up from cot, taken to some distance and thrown on the ground. This part of the testimony of Gomti Devi PW.1 and Ramawati PW2 also does not fit in natural probabilities of situation that two of the culprit(s) would be catching hold of the victim at the time of actual shooting, risking their own life. Holding of the victim at the time actual shooting is always risky for one who holds him because the shot may hit him instead the victim who would naturally struggle to save himself from the shot. It may also be observed at the risk of repetition that even if it is taken for the sake of argument (though it is not believable) that the victim was picked up from the cot and thrown on the ground after being taken for a few steps, then also the incised wounds found on his person go unexplained. In all probabilities, it was a case of hit and run when the assailants were not at all recognised or identified by Gomti Devi PW1 and Ramawati PW2. On the basis of the suspicion and imagination, the story seems to have been spun by them. We are, therefore, in judgment that the evidence of Gomti Devi PW1 and Ramawati PW2 which is in conflict with medical evidence, falls much short of proving the appellants to be guilty."

5. As noted above, aforementioned portion indicates the reasoning for the acquittal.

6. In support of the appeal learned counsel for the appellant State submitted that the High Court has without indicating any basis discarded the eye witnesses version of three persons. The conclusions are based on surmises and conjectures.

7. Learned counsel for the respondents supported the judgment.

8. The first conclusion which is a hypothetical conclusion is that "natural probable conduct of the appellants holding firearms would have been to shoot him dead immediately on locating him sleeping on the cot. There was no necessity for first picking him from the cot taking to some distance and throwing on the ground". Another conclusion arrived at hypothetically is that the testimony of PWs. 1 and 2 does not fit in natural probabilities of situation that two of the culprits would be catching hold of the victim at the time of actual shooting, risking their own life. The High Court came to a peculiar conclusion that if the person holds the victim at the time of actual shooting there is always the risk for one who holds him because the shot may hit him instead of the victim who would naturally struggle to save himself from the shot.

9. The High Court also came to a conclusion that the eye witnesses did not speak of any attack which resulted in incised wounds.

10. We find that the conclusions of the High Court are full of surmises and conjectures and there has been no serious attempt to analyse the evidence. It needs to be noted that the trial Court after careful analysis of the evidence found the accused guilty. In the first information report the names of the accused persons were specifically mentioned. The first information report was lodged almost immediately after the occurrence. In the post-mortem report the doctor has found seven injuries. Four of them are firearm wounds which clearly fit in with the version of the eye witnesses. There were two incised wound of 1.5 cm x .75 cm x muscle deep and 2 cm x 1 cm x muscle deep. The doctor's evidence shows that the firearm wounds were possible when the firing was done from a short distance. The hypothetical conclusion of the High Court that nobody would risk holding a person when somebody is shooting is not correct because the shooting was done from a very close distance. The question of such a person holding the deceased getting hit does not arise in such a situation. In any event, such a hypothetical reason would not be sufficient to discard credible eye witness version.

11. The prosecution has explained as to why PWs have not stated about incised wounds. The witnesses have clearly stated that when the deceased was being taken away they had not seen the nature of attacks but they had seen actual shooting. If during the process of taking the deceased any incised wound is inflicted that obviously could not have seen by the PWs.

12. There was no reason of the High Court to discard the credible, cogent and trustworthy evidence of the eye witnesses. This was certainly not a case where medical evidence was at a variance with the ocular evidence. The evidence of the eye witnesses regarding injuries caused by the firearms is amply corroborated by the evidence of the doctor who found four firearms wounds. In any event unless the oral evidence is totally irreconcilable with the medical evidence it has primacy.

13. Coming to the plea that the medical evidence is at variance with ocular evidence, it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eye-witnesses' account which had to be tested independently and not treated as the "variable" keeping the medical evidence as the "constant".

14. It is trite that where the eye-witnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bentham said, are the eyes and ears of justice. Hence the importance and primacy of the quality of the trial process. Eye witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be credit-worthy; consistency with the undisputed facts; the `credit' of the witnesses; their performance

in the witness-box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.

15. During the pendency of the appeal respondent no.1Jautam has died and the same has been abated so far as he is concerned.

16. The inevitable result is that the appeal deserves to be allowed which we direct. The respondent Hari Chand shall surrender to custody forthwith to serve remainder of sentence. The appeal is allowed.