

CASE NO.:
Appeal (crl.) 952-953 of 1998

PETITIONER:
State of Uttar Pradesh

RESPONDENT:
Sheo Sanehi & Ors.

DATE OF JUDGMENT: 06/10/2004

BENCH:
B.N.AGRAWAL & A.K.MATHUR

JUDGMENT:
J U D G M E N T

B.N.AGRAWAL, J.

All the eight respondents were convicted by the trial court under Sections 302/149 of the Penal Code and sentenced to undergo imprisonment for life. Ayodhya Prasad (respondent No. 2) was further convicted under Section 147 of the Penal Code and sentenced to undergo rigorous imprisonment for a period of six months whereas the other respondents under Section 148 of the Penal Code and each one of them was sentenced to undergo rigorous imprisonment for a period of one and half years. The sentences, however, were ordered to run concurrently. On appeals being preferred by the respondents, the High Court of Allahabad acquitted them of all the charges.

Prosecution case, in short, was that seven months prior to December, 1977, one Sant Saran, father of accused Santosh Kumar, was murdered in which Debi Shanker and Rakesh @ Chhotey, both sons of Devi Din Pandey were made accused in which case bail was granted to both the aforesaid accused persons which infuriated Santosh Kumar. On 20th December, 1977, in the morning, Sushil Kumar (PW 1) came to the house of his maternal grandfather Devi Din Pandey for borrowing oxen to get his plots ploughed and found that his maternal grandmother Smt. Gorha Devi (PW 4) and his maternal grandfather's brother, Promod Kumar (PW 3), were enjoying fire at the door of Devi Din Pandey whereas Devi Din and his two sons, namely, Debi Shanker and Rakesh @ Chhotey were cutting fodder and Vinod Kumar, elder brother of Promod Kumar (PW 3) was milching the cow. At 7.30 a.m., all the respondents, excepting Gur Bax, who were related to each other, came there armed with guns, country made pistols, farsa, barchhi and lathi. Upon arrival, Ayodhya Prasad (respondent No. 2) exhorted other accused person to kill the enemies, namely, Devi Din, Debi Shanker and Rakesh @ Chhotey. Respondent No. 5 \026 Santosh Kumar, son of Sant Saran, fired at Devi Din, respondent No. 1 \026 Sheo Sanehi fired at Debi Shanker and respondent No. 8 \026 Bhagwati fired at Rakesh from their respective guns whereas respondent No. 3 \026 Gur Bax fired at Debi Shanker. Respondent No. 4 \026 Santosh Kumar son of Govind Prasad fired at Rakesh from his country made pistol. Thereupon respondent No. 6 \026 Deo Narain assaulted Devi Din Pandey and Debi Shanker by farsa and respondent No. 7 \026 Ram Asray assaulted them with barchhi whereas respondent No. 2 \026 Ayodhya Prasad assaulted them with lathi. All the three injured persons, namely, Devi Din Pandey, Debi Shanker and Rakesh @ Chhotey fell down and succumbed to their injuries on the spot. Upon halla being raised by Sushil Kumar (PW 1), villagers Asharfi, Babbu and Hira Lal came to the place of occurrence and when the accused persons were challenged, they went away giving out threats. Thereupon, Sushil Kumar (PW 1), after covering a distance of five miles, lodged the first information report on the same day at 11.30 a.m. at Ghatampur police station stating the aforesaid facts disclosing therein names of all the respondents.

Police after registering the case took up investigation and upon completion thereof submitted chargesheet, on receipt whereof the learned magistrate took cognizance and committed all the eight respondents to the court of Sessions to face trial.

Defence of the accused persons was that they were innocent, no occurrence, much less the occurrence alleged, had taken place and the three deceased persons were done to death in the dead of night and nobody had seen the occurrence, but the accused persons have been falsely roped in to feed fat the old grudge. Accused Sheo Sanehi and Santosh Kumar, son of Govind Prasad, took the plea of alibi.

During trial, the prosecution examined seven witnesses, out of whom, informant Sushil Kumar (PW 1), Promod Kumar (PW 3) and Smt. Gorha Devi (PW 4) claimed to be eyewitnesses of the alleged occurrence. Ram Shankar Shukla (PW 2) is the police officer who drew up the first information report, Ratan Singh (PW 5) is the investigating officer and Devi Prasad Mishra (PW 6) is the constable who took the dead bodies for postmortem examination whereas Dr. S.K.Govil (PW 7) is the doctor who conducted postmortem examination on the dead bodies of all the three deceased persons. Apart from the witnesses, several documents were exhibited on behalf of the prosecution. Defence examined several witnesses in support of the plea of alibi of respondent No. 1 \026 Sheo Sanehi and respondent No. 4 - Santosh Kumar son of Govind Prasad to the effect that they were taken into custody in connection with different cases few days before the date of alleged occurrence and on the date and at the time of occurrence, they were in jail. Apart from the evidence of defence witnesses, the defence has adduced documentary evidence as well. Upon conclusion of trial, the learned Additional Sessions Judge convicted the respondents, as stated above, but on appeals being preferred by them, the High Court recorded their acquittal. Hence, the present appeals by special leave by the State of Uttar Pradesh. It may be stated at this stage that during the pendency of these appeals, respondent No. 2 \026 Ayodhya Prasad and respondent No. 3 \026 Gur Bax died, as such appeals against them abated and this being the position, we are required to consider the same on merits in relation to the remaining six respondents.

Learned counsel appearing on behalf of the appellant State in support of the appeals submitted that upon perusal of the order of acquittal rendered by the High Court, it would appear that the same was perverse as it has reversed the order of conviction recorded by the trial court only upon three grounds, viz., (I) Three eyewitnesses, namely, Sushil Kumar (PW 1), Promod Kumar (PW 3) and Smt. Gorha Devi (PW 4) were related to the members of the prosecution party and inimical to the accused persons; (II) medical evidence did not fit in with the time of occurrence disclosed by the prosecution as stomach of the deceased was found empty; and (III) plea of alibi of accused Sheo Sanehi and Santosh Kumar, son of Govind Prasad, was substantiated. On the other hand, learned counsel for the respondents submitted that the view taken by the High Court was not only possible one but the same was a reasonable view, as such no interference by this Court is called for.

First we proceed to consider the medical evidence. Dr. S.K.Govil (PW 7) conducted the postmortem examination on the dead body of deceased - Devi Din on 21st December, 1977 at 3.00 p.m. and found the following injuries on his person :-

1. Incised wound 1<" x ?" x scalp deep on the upper occipital region. Margins were clean cut. Hair were also cut.

2. Incised wound 1" x <" x muscle deep on the right fore head, about =" above the right eye brow. Margins were clean cut.

3. Three abraded contusions in the area of 3" x 2 " on back of

right shoulder.

4. Gun short wound 1" x 1" x chest cavity deep on the left side chest, lower axillary region in mid axillary line in 6th inter costal space. Margins were blackened. It was wound of entry.

5. Seven gun shot wounds in area of 5" x 3" chest cavity deep all communicating with injury No. 4, each measuring ?" x <".

6. Gun shot wound ?" x <" x bone deep on the upper part right axilla.

On internal examination, the doctor found 6th, 7th and 8th ribs fractured on the right side. Both pleuras were punctured through and through. Right lung was punctured by gun shot through and through. Left lung was also punctured by gun shot through and through under injury No. 4. Heart was punctured by gun shot through and through. Large and small intestines were half full. According to the doctor, death was caused due to shock and haemorrhage as a result of gun shot injuries. Doctor also recovered one pellet from right axilla and one wadding piece from right lung.

Likewise, when PW 7 conducted the postmortem examination on the same day at 4.00 p.m. on the dead body of Debi Shanker, aged 26 years, he found following injuries on his person:-

1. Gun shot wound 1" x >" x chest cavity deep on the left side of chest interior to axilla line. Margins were blackened. It was a wound of entry.

2. Five gun-shot wounds in an area of 3" x 2" on the front of left side chest communicating with injury No.1. It was wound of exit.

3. Stab wound 1" x ?" x abdominal cavity deep on the front of epigastric region. Margins were clean cut.

4. Six abraded contusion in an area of 4" x 3" left side of abdomen, 3" left to umbilicus.

5. Abraded contusion 1=" x <" on the right side of abdomen, 5" lateral to umbilicus.

6. Three abraded contusion in an area of 1" x =" on the left side of chest just below injury No. 2.

7. Four gun-shot wound, in an area of 2"x1=" on front right shoulder. These injuries were chest cavity deep.

8. Five gun shot wounds on right side back upper part in an area of 5" x 3". They were exit wound of injury No. 7.

9. Incised wound =" x =" x muscle deep on right side face below jaw.

10. Gun-shot wound of entry x >" x =" x shoulder deep on the back left shoulder outer part.

11. Gunshot wound entry >" x ?" x left elbow.

12. Nine gun shot wound of exit in an area of 2" x 1=" on the back of left elbow.

13. Incised wound =" x ?" x muscle deep on the chin.

14. Two abraded contusion =" x ?", =" x <" on the left thigh upper part.

On the internal examination, the doctor found 2nd, 3rd, 4th, 5th and 6th ribs on the left fractured. Both pleuras were punctured by gun shots. Both lungs were punctured through and through by pellets. Pericardium and heart were also punctured through and through by pellets. Large and small intestines were half full. In the opinion of the doctor, the death was caused due to shock and haemorrhage as a result of the aforesaid injuries. Doctor also recovered some wadding pieces and number of pellets from the body of the deceased.

Thereafter, PW 7 conducted postmortem examination on the dead body of Rakesh @ Chhotey aged 23 years on the same day at 5.40 p.m. and found the following injuries on his person : -

1. Gun shot wound 2" x 1" x neck deep on left side of neck. Margins were blackened and scorched. It was wound of entry.

2. Six gun shot wounds of entry each measuring ?" x ?" x chest cavity deep on left side of chest. 8" below axilla, in an area of 2" x 1=". Margins were blackened.

3. Four gun shot wounds of exit in an area of 2" x 1" each measuring ?" x ?". Injuries were communicating with injury No. 2.

4. Gun shot wound of entry =" x ?" x bone deep on the right fore arm.

On the internal examination, the doctor found right clavicle fractured. 5th, 6th ribs of the left side were also fractured. Pleura and both lungs were punctured by pellets. Larynx, trachea were also punctured by pellets. Stomach was empty. The large and small intestines were half full. In the opinion of the doctor, the death had been caused due to shock and haemorrhage, as a result of the aforesaid injuries. The doctor also recovered some pellets and two wadding pieces from the body.

In the opinion of the doctor, the injuries caused to the three deceased persons were sufficient to cause death in the ordinary course of nature and death was caused within a period of 30 to 36 hours from the time of postmortem examination. Dr. S.K.Govil (PW 7) categorically stated in his evidence that death might have been caused at about 7.30 a.m. According to the finding of doctor referred to above, as would appear from postmortem report, stomach of deceased Rakesh @ Chhotey, aged 23 years, was empty. In this connection, reference may be made to Modi's Medical Jurisprudence & Toxicology, 22nd Edition, at pages 246 and 247 wherein it has been noted that the conditions producing changes vary so much in each individual case that only a very approximate time of death can be given. According to Modi, in addition to this, the time of death can be ascertained to some extent from the contents of the stomach, bladder and the intestines and rate of emptying of stomach varies in healthy persons which is dependent on the consistency of food; motility of the stomach; osmotic pressure of the stomach contents; quantity of food in the duodenum; surroundings in which food is taken; emotional factors; and residual variations. The learned author opined thus that the time varies in a man from 2.5 to 6 hours. The aforesaid opinion of the learned author in his famous treatise has been noticed by this Court with approval in the case of Suresh Chandra Bahri Vs. State of Bihar, 1995 Suppl. (1) SCC 80, at pages 131 para 88 wherein it was observed that as the deceased was a young boy of 12 years, his power of digestion must be assumed to be quick and strong, therefore, if the stomach at the time of postmortem was found to be empty, it was but natural.

In the present case, it is the prosecution case and evidence that at 7.30 in the morning when other members of prosecution party were warming up near the fire and milching the cow, three deceased persons were cutting the fodder for being given to the cattle in the morning and the possibility of their taking the breakfast around 5.30 in the morning before starting the work is but natural and as Rakesh @ Chhotey, aged 23 years, was a healthy young boy at the prime of his youth might have digested the food within two hours as his power of digestion must be quick and strong due to which stomach was found empty. Thus, the finding of the doctor in the postmortem report that the stomach of Rakesh @ Chhotey was found empty at the time of postmortem examination was but natural and cannot create any doubt in relation to the veracity of the prosecution case that occurrence had taken place at 7.30 a.m. on 20th December, 1977 and consequently, the High Court was not justified in throwing out the prosecution case and rejecting ocular version of the occurrence disclosed by the witnesses, more so when the medical evidence supports the prosecution case of assault by different weapons.

Apart from the medical evidence, the prosecution case is supported by the objective findings of the police. The investigating officer \026 Ratan Singh

(PW 5) when visited the place of occurrence found bloodstained earth inside the bhusaura (a store room of cattle fodder) where all the three deceased persons were working on the fodder cutting machine at the time of the alleged occurrence. He further found cut fodder in the said room with stains of blood thereon, seized the same and sent it to the chemical examiner. The Serologist reported that the same contained human blood. Apart from that, the investigating officer found the signs of burning of fire at the door of deceased Devi Din Pandey, as would appear from the site plan, Ex. Ka-22, recovered four empty cartridges and three pellets from the place of occurrence and prepared seizure memos therefor. Thus, the objective findings of the investigating officer fit in with the prosecution case that the occurrence had taken place at the place where the three deceased persons were working on fodder cutting machine at the time of the alleged occurrence.

As far as motive for the murder is concerned, from the evidence of Sushil Kumar (PW 1), it would appear that all the accused persons, excepting accused Gur Bax, were related to each other. Accused Santosh Kumar is son of Sant Saran who was murdered for which deceased Debi Shanker and Rakesh @ Chhotey were made accused and were granted bail prior to the date of the alleged occurrence. Accused Ayodhya Prasad is grandfather of accused Santosh Kumar, son of Sant Saran, and accused Ram Asray whereas accused Sheo Sanehi and Deo Narain are sons of accused Ayodhya Prasad. Accused Bhagwati is cousin of aforesaid accused Santosh Kumar as mothers of both of them are sisters. Accused Santosh Kumar son of Govind Prasad is grandson of brother-in-law of accused Ayodhya Prasad. Accused Gur Bax is friend of accused Ram Asray and was on visiting terms with him. PWs 1, 3 and 4 have categorically stated that as father of accused Santosh Kumar was murdered for which deceased Debi Shanker and Rakesh @ Chhotey were accused and before the date of the alleged occurrence, they were granted bail, accused Santosh Kumar was having a grudge with the deceased persons which led to the commission of the present crime.

Coming to the ocular version of the occurrence, the prosecution has relied upon the evidence of three eyewitnesses, viz., PWs 1, 3 and 4. PW 1 has supported the prosecution case in all material particulars which is consistent with his subsequent statement made before the police. The ground of attack to his evidence was that he was a resident of village which is situated at a distance of 40 kilometers from the place of occurrence and he had no occasion to be present at the place of occurrence. He stated that his mother was adopted by one Smt. Mahadei of village Siromanpur where the occurrence had taken place, he was born in village Siromanpur and was residing in the said village with his mother - Smt. Bishandei since his childhood inasmuch as he was looking after cultivation of her lands. The fact that his mother was adopted by Smt. Mahadei would be apparent from the

registered Will dated 11th August, 1977 (Ex. Ka 52) executed by Smt. Mahadei in favour of his mother showing that she was her adopted daughter and was residing with her. Ex. Ka-50 and Ex. Ka-51 are the extracts of khatauni and khasra in which name of Bishandei, mother of this witness, is recorded along with Smt. Mahadei in relation to the agricultural lands. That apart, Exs. 13, 14 and 15 are transfer certificates, high school certificate and mark sheet in relation to this witness which show that he had passed out from a school situated in village Siromanpur. Apart from the aforesaid documents, invitation card Ex. 16 has been filed to show that the sacred thread ceremony of PW 1 as well as his younger brother - Subhendu Kumar was held in the year 1975 in village Siromanpur. Besides that, letters - Exs. 17 to 20 have been filed to show that he had received the same at his address in village Siromanpur. Ex. Ka-47 is gun licence in the name of PW 1 in which he was shown to be a resident of village Siromanpur. These facts clearly show that PW 1 was resident of village Siromanpur, as such his presence at the place of occurrence and time of occurrence cannot be doubted.

So far as PWs 3 and 4 are concerned, PW 3 is nephew of deceased Devi Din whereas PW 4 is widow of the said deceased, as such they are natural witnesses and their presence at the alleged place of occurrence cannot be doubted. The names of these two witnesses were disclosed in the first information report itself and they supported the prosecution case in all material particulars in their statements made before the police as well as in court and no infirmity could be pointed out in their evidence, excepting that they were related to the deceased persons and inimical to the accused. It is well settled that merely because a witness is related to the prosecution party and inimical to the accused persons, his evidence cannot be discarded if the same is otherwise trustworthy. In the case on hand, we do not find any infirmity whatsoever in the evidence of PWs 1, 3 and 4, as such it is not possible to disbelieve them, especially in view of the fact that their evidence is supported by medical evidence as well as objective findings of the investigating officer, but the High Court has committed a serious error in discarding their testimonies on this score.

In support of the plea of alibi of accused Sheo Sanehi and Santosh Kumar, son of Govind Prasad, the defence examined several witnesses. So far as accused Santosh Kumar is concerned, the two Assistant Jailors, namely, Mani Kant Singh (DW 1) and Ram Raj Tripathi (DW 3) proved entry of the jail register. In their evidence, they admitted that when this accused was taken to Unnao jail on 17th December, 1977 and released on 24th December, 1977, his identification marks were noted down in the original gate book and register of the said jail, but most of the identification marks noted down in the aforesaid registers of jail were not traceable on the person of this accused. They further stated that though prominent identifying marks were visible on the body of this accused, but the same were not noted down in the register. That apart, this accused is said to have been arrested by Radhey Shyam Gupta (DW 4) and Raj Kumar Pandey (DW 6) and entry to that effect was made in the crime register duly maintained but the trial court, after threadbare discussion of evidence and taking into consideration all the pros and cons of the matter, has come to the conclusion that the entries therein were fabricated. Learned counsel for the respondents could not point out any infirmity in findings of the trial court on this score. This being the position, we are of the view that the trial court was quite justified in holding that this accused set up a false plea of alibi, but the High Court was not justified in reversing the findings in this regard and that also without considering discrepancies in the evidence adduced on behalf of the defence in relation to the plea of alibi.

So far as the plea of alibi of accused Sheo Sanehi is concerned, the prosecution examined Pyare Lal Gupta (DW 8) and Kanhya Lal (DW 10). DW-8 is a constable who claimed to have arrested the accused on 19th December, 1977 at 9.45 p.m. at Unnao railway station. He deposed in court that the only ground of arrest of accused Sheo Sanehi was that he was found crossing the railway line. This witness during the course of cross-examination had accepted that, excepting this accused, nobody else was ever arrested for

crossing the railway line. DW-10 is a person who stated that DW-8 brought this accused to the Government Railway Police Station at Unnao from where Ramjas Yadav (DW 9) took him to jail. DW-10 admitted in his evidence that the person who was brought to the police station and taken therefrom by DW-9 for being lodged into jail was not baldheaded whereas this accused was baldheaded. After taking into consideration these infirmities, the trial court did not accept the plea of alibi of this accused, but the High Court, without considering discrepancies in the evidence adduced by the defence in this regard, reversed the finding and accepted the plea of alibi set up by the accused. We have no difficulty in holding that the trial court was quite justified in rejecting the plea of alibi of the aforesaid two accused persons and the High Court has committed error in accepting the same. For the foregoing reasons, we are of the view that the prosecution has succeeded in proving its case beyond reasonable doubt and the High Court was not justified in recording order of acquittal which suffers from the vice of perversity and is consequently liable to be interfered with by this Court in exercise of powers under Article 136 of the Constitution.

Accordingly, the appeals against respondent No. 2 \026 Ayodhya Prasad and respondent No. 3 Gur Bax are held to have abated in view of the fact that they died during the pendency of appeals whereas appeals filed in relation to other respondents are allowed, the order of acquittal rendered by the High Court in their favour is set aside and convictions and sentences recorded by the trial court against them are restored. Bail bonds of respondent No. 1 \026 Sheo Sanehi, respondent No. 4 \026 Santosh Kumar, son of Govind Prasad, respondent No. 5 \026 Santosh Kumar, son of Sant Saran, respondent No. 6 \026 Deo Narain, respondent No. 7 \026 Ram Asray and respondent No. 8 \026 Bhagwati, who are on bail, are cancelled and they are directed to be taken into custody forthwith to serve out the remaining period of sentence for which compliance report must be submitted to this Court within a period of one month from the date of receipt of this order by the trial court.