

PETITIONER:
STATE OF U.P.

Vs.

RESPONDENT:
ASHOK DIXIT AND ANR.

DATE OF JUDGMENT: 16/02/2000

BENCH:
G.T.Nanavati, S.N.Phukan

JUDGMENT:

PHUKAN, J

This appeal by the State is directed against the judgment and order dated 16.08.1988 passed by the High Court of Allahabad in Criminal Appeal Nos. 2742, 2743 and 2338 of 1984 arising out of Sessions Trial No. 202 of 1982. The learned Additional Sessions Judge, Agra in the above Sessions Case convicted accused respondents - Ashok Dixit and Chaman Lal under Sections 302 and 307 IPC and Section 25 of the Arms Act and sentenced them accordingly. Two separate appeals were filed before the High Court by the respondents-accused and one appeal by the State for enhancement of the sentence. The High Court dismissed the appeal filed by the State and allowed the appeals filed by the respondents-accused and acquitted them of their charges. On 8.8.1982, at about 9.00 p.m., on hearing sound of gun shot coming from the house of deceased Dr. Dubey, his brother Bhagat Dayal Dubey P.W.1, proceeded to the house of deceased Dr. Dubey, alongwith his two sons. In the house of the deceased, he met two police officers Vijai Bahadur Singh P.W.7, Station House Officer of Police Station Civil Lines, District Etawah, Sup-Inspector of Police Uma Shanker Yadav, Raj Narain Singh P.W.15 Compounder of deceased Dr. Dube, Shri S.K. Gupta- Advocate and one or two other persons of the locality. The house was dark as there was no electricity and two police officers took position behind the varendah of the house and P.W.1 alongwith his two sons stood near the grill of the western varendah. They heard shots from the first floor of the house where deceased Dr. Dubey, his wife deceased Manorama Dubey, her daughter Kumari Ritu P.W.3 and Umesh Chand Mishra P.W.2 maternal uncle of deceased Manorama Dubey were residing. At the time, they saw accused Brijendra Kumar tumbling down the staircase to the ground floor followed by present two accused respondents Ashok and Chaman Lal, and three accused were apprehended by the two police officers, P.W.7 and Sub-Inspector Uma Shankar Dubey. Electricity was restored when the accused were apprehended. P.W.1 with his two sons went upstairs and found deceased Dr. Dubey lying in a pool of blood near the dining table. Deceased Manorama Dubey was lying in a pool of blood on the dewan by the side of the wall of the drawing room and Munnu Singh was lying in the injured condition. PW-2 was also found in injured condition. They were taken to the hospital by PW-1 and one Pandey a tenant on the first floor where Dr. Dubey was residing. Dr. Dubey and his

wife were found dead. P.W.2 and Munnu Singh were medically examined and given treatment.

A pistol and four live cartridges were recovered from the possession of the accused Ashok and country made pistol and five live cartridges from the possession of accused Chaman Lal and a country made pistol and two cartridges were recovered from accused Brijendra Kumar. The two police officers did not go upstairs where the occurrence took place. They took the accused persons to the police station. Police after investigation submitted charge sheet. The FIR

Exh.1 was lodged by P.W.1 on the basis of statement of injured Munnu Singh but he was not examined, therefore, the High Court was of the opinion that the FIR cannot be accepted as corroborating piece of evidence of the statement of P.W.1. Accused Brijendra Kumar died.

We have heard Shri K.N. Nagpal, learned counsel for the appellant and Shri K.T.S. Tulsi, learned senior counsel for the accused respondents.

Umesh Mishra PW2 uncle of the deceased Manorama and Ritu PW3 daughter of deceased Dr. Dubey were the eye witnesses. PW-2 used to live in the house of deceased Dr. Dubey. According to PW-2 while he along with deceased Dr. Dubey, his wife deceased Manorama and their daughter Ritu- PW3 were sitting, Munnu Singh, compounder of Dr. Dubey called Dr. Dubey and he went out. They heard gun shots stood up and after some time Dr. Dubey came and fell down near the dining table. Dr. Dubey was followed by three assailants. One assailant fired at deceased Manorama. Accused respondent Ashok fired at him and also at deceased Manorama. He got panicky, went to the verandah and fell down and from there he heard the sound of firing. At that point of time PW-1 and his two sons came up stairs and by that time electricity was restored. Both PW-1 and PW-2 went to the drawing room and they found Dr. Dubey lying on the floor of the dining room and Manorama on the dewan of the drawing room. Munnu Singh who was also injured came in side and fell down. PW-3 came out from beneath a cot from the bed room.

PW-2 has stated that accused-respondent Ashok was known to him and Dr. Dubey and used to visit frequently the house of Dr. Dubey. Accused Chaman Lal was not known to him earlier. PW-2, Dr. Dubey, Manorama and Munnu Singh were taken to the hospital by PW-1 with the help of one Pandey through the ground floor. The accused persons after being arrested were kept in the ground floor. PW-2 did not mention in his statement under Section 161 Cr.P.C that accused Ashok came along with other two accused to the first floor and fired at him and Manorama and also the fact that accused-Ashok and other two accused were in the ground floor.

These are material omissions. Therefore, we are of the opinion that these omissions are fatal for the prosecution. More, particularly, when accused-Ashok was related and regular visitor to the house of Dr. Dubey. We, therefore, hold that there was no identification by PW-2 of accused- Ashok. Regarding accused-Chaman Lal after the occurrence there was no test identification parade and for the first time PW-2 identified the accused- Chaman Lal in the court. This identification cannot be accepted. PW-3 was a child witness and at the time of occurrence she was

aged 9 ½ years old. Occurrence took place on 08.08.82 her statement under Section 161 Cr.P.C. was recorded on 10.08.82 though after the occurrence she was residing with her uncle which was at a stones throw from the house of Dr. Dubey.

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Law is well settled that evidence of a child witness must be evaluated carefully as a child may be swayed by what others tell him and as an easy prey to tutoring. Wisdom requires that evidence of a child witness must find adequate corroboration before it is relied on. [see Panchhi and Ors. Vs. State of U.P. 1998 (7) SCC 177].

The High Court was of the view that considering her age at the time of occurrence PW-3 might have been sleeping. This cannot be said to be impossible. PW-3 also has deposed that accused-Ashok was known to her family and used to visit their house but accused Chaman Lal was not known to this witness. She identified both the accused in the court. At a time of occurrence there was no electricity, therefore, it is difficult to accept that she being aged 9 ½ years could have identified accused-Chaman Lal during the occurrence. From the evidence of PW-1 and PW-2 we find that when they went to the bed room, PW-3 came out from beneath a cot. This fact would support the contention that she might not have seen the occurrence. We have already discarded the evidence of PW-2 on the point of identification of the accused, therefore, it will be risky to accept the evidence of PW-3 for the purpose of identification as her evidence is uncorroborated. Dr. Dubey was called by Munnu Singh. He was found in the injured condition in the up stairs by PW-1 and PW-2 and was also taken to the hospital along with others. This material witness was not examined and no explanation has been given for his non-examination. This in our opinion is fatal for the prosecution.

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According to Mr. Vijay Bahadur Singh PW-7, Station House Officer of Civil Lines, Police Station, he along with sub-Inspector Uma Shanker Yadav was on patrolling duty and when they were checking the out posts of Civil Lines, Police Station, they heard sound of gun fire coming from the house of Dr. Dubey at about 9.00 p.m and he along with sub-Inspector, Yadav proceeded on the motorcycle to the house of Dr. Dubey where they met Satyendra Gupta, Advocate and Raj Narain Singh PW-15. They also saw PW-1 and his two sons. There was no electricity at that time and these two police officers did not go inside the house but took position outside the house. They heard the sound of gun fire coming from the first floor of the house where deceased-Dr. Dubey was residing. Thereafter, they saw accused Brijendra Kumar tumbling down the stair-case to the ground floor followed by other two accused who were apprehended and arrested by them. They recovered pistols and cartridges as stated above from them.

No record has been produced to show that these two police officers were near the place of occurrence at the outpost of Civil Lines, Police Station on patrol and checking duty. This outpost is at the distance of 100- 125 yards from the place of occurrence. After arrest police officers did not go up stairs where four persons were lying injured and according to PW-15 he wanted to go up stairs but he was summoned by these police officers. These police officers saw PW-1 and his two sons going up stairs. PW-1 with the help of Pandey took deceased Dr. Dubey, his wife

deceased Manorama and injured Munnu Singh and PW-2 through the ground floor to the hospital. If police officers were present at that time on the ground floor their immediate reaction would have been to make proper inquiries, go up stairs and see the place of occurrence but they did not do so. This behavior of these two police officers is contrary to the natural human conduct and it is difficult to believe their presence at the place of occurrence as deposed by PW-7.

Exhibit Ka-6 is the medical report of accused-Brijendra Kumar. Injury Nos. 2 and 3 were caused as a result of gun shots. All these injuries were bleeding but police did not find blood on the ground floor or on the stair case. According to Dr. R.K. Choudhary PW5 due to the injuries caused to accused-Brijendra, he might have suffered paralysis and he could not have moved 5-6 steps after falling down. According to prosecution witnesses accused-Brijendra came down by stair case to the ground floor fell down, got up and after going 5-6 steps fell down. Therefore, medical evidence does not support the evidence of the witnesses.

Ramashram Pandey PW17 was examined as ballistic expert. According to him metallic bullets- Exhibit EB-1 recovered from the body of Dr. Dubey and Exhibit EB-2 recovered from the body of deceased Manorama were not fired from the pistols recovered from the possession of accused-respondents and Brijendra Kumar. Moreover, there were gun shot injuries on accused Brijendra Kumar. PW-2 and Munnu Singh were also injured. No explanation is forthcoming from the side of prosecution for the above discrepancies, therefore, we hold that the occurrence did not take place as alleged by the prosecution. We further hold that the High Court has rightly acquitted the accused-respondents. In result, the present appeal has no merits and accordingly it is dismissed.