State Of U.P vs Ashok Kumar & Another on 2 February, 1979

Equivalent citations: 1979 AIR 874, 1979 SCR (3) 1

Author: Syed Murtaza Fazalali

Bench: Syed Murtaza Fazalali, A.D. Koshal

PETITIONER:
STATE OF U.P.

Vs.

RESPONDENT:
ASHOK KUMAR & ANOTHER

DATE OF JUDGMENT02/02/1979

BENCH:
FAZALALI, SYED MURTAZA
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FAZALALI, SYED MURTAZA
KOSHAL, A.D.

CITATION:
1979 AIR 874 1979 SCR (3) 1
1979 SCC (3) 1
CITATOR INFO :
F 1989 SC1205 (18)

ACT:
Penal Code-s. 302-Supreme Court-When would interfere With order of acquittal in special leave-Witnesses claimed they identified the assailant from a distance of 150 yards on a moonlight night-If could be believed.

HEADNOTE:
The respondents were charged with an offence under s. 302, I.P.C. The prosecution case was that on the night of occurrence (which was a moonlight night) the deceased and the prosecution witnesses attended a drama in the Ramlila Grounds of the village and when the deceased, after taking two samosas and tea, was returning home some time past midnight, the respondents shot him dead and that this was seen by them from a distance of 150 yards from the scene of occurrence.

The trial court, believing the prosecution version, convicted the respondents. On appeal the High Court rejected

the prosecution story and acquitted both the respondents. The State came in appeal to this Court by special leave.

Dismissing the appeal,

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HELD: It is well-settled that this Court, in special leave, would not normally interfere with an order of acquittal unless there are cogent reasons for doing so or unless there is a gross violation of any procedure of law which results in serious miscarriage of justice. [2H]

Having regard to the glaring defects in the prosecution story this is not a case in which this Court should interefere with the order of acquittal. [3B]

In the present case, though it was a moon-lit night according to the almanac the moon would have covered three-fourths distance on the night of occurrence. Even in the moonlight it would have been difficult for the witnesses to identify the assailants; even if they did, the possibility of mistake in identification could not be completely excluded. According to an authority, when the moon is at the quarter, it is possible to recognise persons at a distance of from 21 ft; in bright moonlight at from a distance of 23 to 33 ft. and at the very brightest period of the full moon at a distance of from 33 to 36 ft. In tropical countries the distance for moonlight may be increased. Therefore, it would not have been possible for the eye witnesses to identify the assailants from a distance of 150 yards. [3E-G]

After the assailants had given a call and fired at the deceased the witnesses would not have flashed the torch light, as suggested by the prosecution, and exposed themselves to the risk of being shot at. Even if the torches were lighted, in view of the distance, it would not have been possible for the witnesses to identify the assailants with certainty. [4B]

Secondly, the medical evidence had shown that the stomach of the deceased was empty and the large intestines too were empty. Therefore, the evidence

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of the witnesses that the deceased took two samosas after the drama at midnight and before the attack is completely falsified by medical evidence. Another prosecution witness stated that the deceased having had stomach ulcers never took any food at night. Apparently until the deposition of the first witness was complete the prosecution did not realise the gravity of the statement made by him and deliberately introduced a change on a vital issue which by itself is an important circumstance throwing doubt on the prosecution case. While witnesses may lie, circumstances would never. Tho evidence of the doctor, based on conclusive evidence cannot be belied. [4F-H]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 166 Of 1976.

Appeal by Special Leave from the Judgment and Order dated 21-4-75 of the Allahabad High Court in Criminal Appeal No. 2776 74 and Referred No. 76/74.

D. P. Uniyal, and M. V. Goswami for the Appellant. D. Mookherjee, O. P. Tewari, S. S. Srivastava and K. C. Jain, for Respondent No. 1.

R. K. Garg, V. J. Francis and D. K. Garg for Respondent No. 2.

The Judgment of the Court was delivered by FAZAL ALI J.-The respondents had been convicted by the Additional Sessions Judge, Banda under section 302 of Indian Penal Code and sentenced to imprisonment for life. The respondents thereafter filed an appeal to the High Court of Allahabad which after a full and complete consideration of the evidence came to a finding of fact that the prosecution has not proved its case and accordingly acquitted the respondents. The High Court rejected the prosecution case mainly on two grounds. In the first place, it held that having regard to the circumstances and the distance from which the witnesses saw the accused, it was difficult for them to identify the accused. Secondly, the High Court found that in view of the medical evidence which showed that the large intestines of the stomach were absolutely empty, the evidence of the eye-witnesses could not be believed. Against the order of acquittal passed by the High Court the State came up to this Court by special leave and after obtaining the same the case has been placed before us for hearing.

The facts of the case have been set out in the judgment of the High Court and it is not necessary for us to repeat them again. It is well settled that this Court would not normally interfere with an order of acquittal in special leave unless there are cogent reasons for doing so or unless there is a gross violation of any procedure of law which results in serious miscarriage of justice. We have heard counsel for the parties and have gone through the judgment of the Sessions Judge and of the High Court. It is true that High Court has not made an attempt to discuss the intrinsic merits of the evidence of the eye-witnesses but having regard to the glaring defects appearing in the prosecution case we are in agreement with the ultimate view taken by the High Court.

According to the prosecution the deceased along with P.Ws. 1 & 2 had gone to Atarra to witness a drama in the Ramlila Grounds. The party reached Atarra at about 9 o'clock and the drama finished at about 12 o'clock. Baura and Chanada P.Ws. 2 and 5 were also with the deceased Budhi Bilas when he was returning from the Natak. It is alleged that at about 12.30 a.m. the respondent-Ashok Kumar fired a few shots which hit the deceased as a result of which he died instantaneously. The two eye-witnesses P.Ws. 1 and 2 admittedly saw the firing from a distance of about 150 yards, as would appear from an examination of the site plan Ka-23 and which is endorsed by P.W. 1 who stated in his evidence that he has given the detail of the place from where they saw the occurrence to the Investigating Officer at the spot. The first question which falls for consideration is as to whether or not the witnesses would be in a position to identify the respondents from such a large distance at night. It is true that it was a moon-lit night but from a reference to the almanac it would appear that the moon had covered 3/4th distance on the night of occurrence and was to set at 3.23 a.m. Even

though there may be some moon light at that night, it is difficult for the witnesses to identify the respondents or even if they did the possibility of mistake in identification cannot be completely excluded. In this connection, we may refer with advantage to the following passage appearing in Dr. Hans Gross's Criminal Investigation at page 185:

> "By moonlight one can recognise, when the moon is at the quarter, persons at a distance of from 21 feet, in bright moonlight at from 23 to 33 feet; and at the very brightest period of the full moon, at a distance of from 33 to 36 feet. In tropical countries the distances for moonlight may be increased."

The opinion of Gross referred to above fully fortifies our conclusions that it was not possible for the witnesses to have identified the respondents even in moonlight from a distance of about 150 yards. In these circumstances, therefore, the High Court was fully justified in holding that it was not possible for the eye-witnesses to identify the respondents from such a long distance on the night of the occurrence. The prosecution suggested that the witnesses had lighted their torches and it was in the light of torches coupled with moon light that identification was possible. In the first place, we find it difficult to believe that after Ashok Kumar had given a call and fired, the witnesses would dare to flash the torch light and expose themselves to the risk of being shot themselves. Secondly, even if torches were lighted, in view of the large distance, it would not be possible for the witnesses to identify the respondents with absolute certainty.

Another important circumstance which appears to clinch the issue is the medical evidence in the case. It appears from the evidence of Dr. Pillay, P. W. 7 who performed the post-mortem that the small intestines were distended with gas and in the end of the small intestines liquid faeces was present. The doctor further says that large intestines were empty. Doctor also found the stomach to be empty. These facts are also mentioned in the post-mortem report. This clearly shows that the deceased must have been shot at a time when he had either not taken any food at all or the entire food if taken was fully digested and left the stomach. P.W.1 had stated in his evidence that he along with his uncles and the deceased took tea and ate samosas. The deceased had taken two samosas. This meal was taken by the deceased and the witnesses after the Natak ended, that is to say, at about 12 O'clock in the night, because the evidence of P.W.1 is that the Natak started at 9 p.m. and continued for three hours. If the evidence of this witness is believed, then it is completely falsified by the medical evidence which shows that the stomach was empty. In other words, if the witness is believed, the position would be that the deceased would have been shot only a few minutes after he had taken two samosas and a cup of tea. In that case the stomach would not be empty. Perhaps realising this difficulty the prosecution through the mouth of P. Ws. 2 and 3 tried to effect a deliberate embellishment in their evidence by making them depose that the deceased Budhi Bilas had taken only milk when he started. P.W. 3 goes to the extent of saying that deceased Budhi Bilas was suffering from stomach ulcers and he never took any food at night. The story of the deceased having taken samosas is given a complete go-back by other eye-witness, P.W. 2. Indeed, if these witnesses were present at the time when the deceased has taken something we should not have expected any discrepancy of this kind on this important aspect of the matter. Either deceased took food or he did not take any food. This fact would be known to his son, P.W. 1 and also to P.W. 2. We cannot understand what is the explanation for the two different versions given by P.Ws. 1 & 2 unless

the idea was to bring the evidence, at least, of P.W. 2 in tune with the medical evidence. Until the deposition of P.W. 1 was complete, the prosecution did not realise the gravity of the statement made by P.W. 1 that the deceased has taken two samosas and a cup of tea shortly before the occurrence. This deliberate attempt to introduce a change on a vital issue is by itself a very important circumstance which throws doubt on the prosecution case. It is manifest that whereas witness may lie circumstances never lie. The evidence of the doctor is based on conclusive circumstantial evidence which cannot be belied, and therefore an attempt has been made by the prosecution to introduce improvements in explaining the lacuna present in the case. Apart from this we have gone through the evidence of P.Ws. I & 2 and their evidence also is full of discrepancies as pointed out by the High Court. Taking therefore an overall view of the picture, we hold that this is not a case in which we should interfere with the order of acquittal passed by the High Court.

For the reasons given above, we confirm the order of the High Court and dismiss this appeal. The respondent No. 1 who is in jail is directed to be released forthwith and respondent No. 2 will be discharged from his bail bonds.

P.B.R. Appeal dismissed.