Himanshu Mohan Rai vs State Of U.P. And Anr on 7 March, 2017

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Bench: L. Nageswara Rao, S.A. Bobde

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL No. 827 OF 2011

HIMANSHU MOHAN RAI
…APPELLANT VERSUS

STATE OF U.P. AND ANR.
…RESPONDENTS

WITH

CRIMINAL APPEAL No. 829 OF 2011

JUDGMENT

S. A. BOBDE, J.

Criminal Appeal No.827 of 2011 is filed by P.W. 1 (Himanshu Mohan Rai) and the same is directed against the acquittal of respondent No.2 - Imran Afreen. The Sessions Court convicted the respondent-accused under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as the 'IPC') for the murder of the deceased, Lalit Mohan Rai. He was sentenced to life imprisonment along with a fine of Rs.50,000/- by the Sessions Court. The High Court set aside the judgment of the Sessions Court and acquitted the respondent-accused. The State of Uttar Pradesh has also preferred

Criminal Appeal No.829 of 2011 against the acquittal.

The FIR

2. The incident took place on 01.01.2005 between 20:30 – 21:00 hours in front of Hotel Shalimar which belonged to the deceased and his brother. The FIR was registered on the same day at 23:05 hours by one, Himanshu Mohan Rai (P.W.1), the brother of deceased. According to the FIR, the offence was committed by Imran Afreen, and two of his accomplices whose names and addresses were unknown at the time of the reporting of the offence. The informant reported that at about 20:30 hours, a waiter from his hotel, namely Manoj Kumar Singh alias Bahadur had gone to Varuna Bridge to bring milk. While returning to the hotel from getting the milk, he collided with the appellant who along with his accomplices was in a state of intoxication. They assaulted the waiter in their state of inebriation, and the waiter ran into Hotel Shalimar for taking refuge. The appellant followed the waiter in Indigo Car No.U.P.-65-X-0002 and his accomplices followed the waiter on Yamaha motorcycle No.U.P.Z-5214. They forcibly entered the hotel and started beating the waiter up.

The first informant, the deceased and Rajnath Singh (owner of the hotel building) tried to pacify the assailants and took them outside the hotel. Outside the hotel, the appellant took out his pistol and fired several shots at the informant's older brother, Lalit Mohan Rai. Lalit Mohan Rai got injured and fell down. Chander Shekhar Rai, Krishan Kumar Singh and many others gathered upon hearing the sounds of the gun shots. Looking at the crowd, the accused and his accomplices ran away leaving their vehicles behind.

Lalit Mohan Rai was taken to Chauraha Hospital for treatment where he died.

The Investigation

3. The investigation was initially conducted by Station Head Officer, D.P. Shukla (P.W. 6). The appellants alleged that D. P. Shukla was hand in gloves with the accused. The offence registered under Section 302 IPC was changed by the police inspector and registered under Section 304 IPC instead. Consequently, the investigation was transferred to a sub-inspector by the name of Srinivas Pande (P.W. 5). The appellant complained that Srinivas Pande was partial to the accused and thereafter, the investigation was transferred back to an inspector by the name of R.K. Singh (P.W. 7).

4. The accused was arrested on 05.01.2005.

The Sessions Court

5. The Sessions Court convicted the three accused Imran Afreen, Gufran Afreen and Abdul Wasi for the offence under Section 302 of the IPC. Gufran Afreen and Abdul Wasi were found to be juvenile and therefore prosecuted under the Juvenile Justice Act.

The Sessions Court found that the prosecution story was proved. Imran Afreen got into an altercation with Bahadur, the waiter of Hotel Shalimar. Bahadur ran into Hotel Shalimar which was run by the deceased and his brother (P.W. 1). Imran Afreen in an Indigo car and the other accomplices on a Yamaha motor bike followed Bahadur and entered the hotel. Lalit Mohan Rai along with Himanshu Mohan Rai and Rajnath Singh took the assailants outside the hotel to pacify them. Outside the hotel, there was a heated discussion upon which one of the accomplices exhorted Imran Afreen to fire the shot by saying-"what are you looking at?" and told him to shoot and kill Lalit Mohan Rai. Imran Afreen then fired five rounds. Lalit Mohan Rai fell down and was taken to the hospital by P.W. 1. He was declared dead at the hospital.

The High Court

6. The High Court disbelieved the story of the prosecution and set aside the conviction recorded by the Sessions Judge: -

(i) Mainly on the ground that P.W. 1 is not a reliable witness in view of the following:

(a) The altercation between Bahadur and the accused on the road was admittedly not witnessed by P.W. 1. He had met the waiter on 01.01.2005, 02.01.2005 and 03.01.2005. He admitted that he did not meet Bahadur till the time of the cremation of his brother.

(b) P.W. 1 came to know the names of the accused on 05.01.2005 when he had gone to the house of Congress Leader Abdul Kalam to pay homage. He overhead the names of the accused, who he did know before, but disclosed their names to the police only on 09.01.2005.

(c) P.W. 1 had gone to Ghazipur and returned only in the evening of 05.01.2005. The fact that the inquest was performed in his presence in the afternoon, and thereafter the dead body was sent for post mortem, negates his presence.

(d) P.W. 1 did not write the FIR himself even though he was literate, having received an education of intermediate level. He told his uncle, Girjesh Rai, about the incident. Girjesh Rai wrote the incident down and P.W. 1 signed it after reading what was written. Subsequently, Girjesh Rai went to the Police Station Cant and lodged the report.

The High Court concluded that he was nowhere around the place at the time of incident.

(ii) The prosecution withheld the examination of the waiter, Bahadur, who was an eye witness even though the investigating officer met him at the place of incident during the time of recovery and prepared the site plan at his instance.

(iii) The prosecution withheld 2 persons Rajnath Singh and K.K. Singh who were examined before the Juvenile Justice Board but were declared hostile. Their names appear in the list of witnesses but they were not examined.

(iv) The assertion that the dead body of the deceased was taken in a tempo was neither substantiated nor shown to the Investigating Officer. There was no blood found and the blood stained clothes of the witnesses were also not produced before the police.

(v) The FIR was ante-timed and shown as registered at 23:05 hours, although it was registered later on.

The Witnesses

7. Himanshu Mohan Rai (P.W. 1) is the brother of the deceased and the first informant. He used to manage Hotel Shalimar along with the deceased. This was not disputed by the accused.

7(a). P.W. 1 stated that he saw the incident clearly as the hotel was decorated with lighting for New Year's Eve and therefore identified the accused in that light. He stated that he removed the blood stained sweater, presumably worn by Lalit Mohan Rai, and kept it in the storage of the scooter belonging to Girjesh Rai.

He also stated that Bahadur was present when Imran Afreen shot Lalit Mohan Rai. He omitted giving the names of the accused in the application dated 08.01.2005, given to the S.S.P to apply the appropriate section because he did not think it was necessary. He denied the suggestion that his brother was killed by some professional killers away from the hotel.

The testimony of this witness has not been shaken in any material particularly in the cross examination. We find nothing incredible about the testimony of this witness and there is no reason to discard to discard it.

7(b). Shri Amarendra Sharan, counsel for the respondent-accused, submitted that the presence of P.W. 1 is doubtful because the witness did not produce his blood stained clothes before the Court nor did he show the blood stained sweater to the police. P.W. 1 gave no explanation for there being no sweater on the body of the deceased, when the deceased was taken to the hospital.

We do not consider this reason sufficient enough to discredit the story of P.W. 1 in its entirety. It is possible that the witness did not remember what happened to the sweater in the emergency that arose after his brother was shot. There is also no merit in the criticism that the incident of the first quarrel with the waiter had been mentioned in the FIR, even though the witness stated later that Bahadur did not explain the incident to him. It is possible that Bahadur mentioned the incident and did not explain how the quarrel arose. The other omissions during the course of cross examination, such as the failure of P.W. 1 to mention that he overheard the names of the other accused at the funeral, is not crucial. We also do not find anything unbelievable in the statement of the witness that he learnt the names of the other accused at the funeral of local MLA Abdul Kalam.

8. Chandra Shekhar Rai (P.W. 2) was interrogated after about 25 to 30 days and was questioned 8 days after the incident. He is criticized as a planted witness. In this regard it may be noted that the investigation was first carried out by S.H.O. D.P. Shukla (P.W. 6), who was the investigating officer

from the time of the incident to 00:10 hours on the next day. Remarkably, this investigating officer changed the registration of the offence of murder under Section 302 to Section 304 of the IPC. Since Section 304 became a lesser offence, the investigation was transferred to a sub-inspector by the name of Sriniwas Pande (P.W. 5) who was the investigating officer from 00:10 hours on 02.01.2005 to 18:00 hours on 09.01.2005. On receiving a complaint by the accused that the investigation was not being done properly, the police transferred the investigation back to an inspector of the Police; one R.K. Singh (P.W.7) who took over on 09.01.2005 and investigated the matter till the charge-sheet was filed on 19.01.2005. This is possibly why P.W. 2 was not interrogated for a long time. It appears that the new investigating officer took time to follow up on the leads, interrogate P.W. 2 and record his statement.

9. In these circumstances, we do not consider the delay to cause such suspicion as to warrant the complete rejection of the testimony of P.W. 2. The testimony of P.W. 2 completely corroborates the version of P.W. 1 in all material details of the incident. We are not inclined to reject this testimony on the ground that his statement was recorded after 30 days particularly since there was a change of investigating officers.

We thus find that the evidence of the P.W. 2 corroborates the evidence of P.W. 1. The testimony is credible and it proves that the accused shot the deceased as alleged by the prosecution.

Ante-timed FIR

10. The FIR was lodged on 01.01.2005 at 23:05 hours. P.W. 1 narrated the incident of collision with Bahadur even though he admitted in his cross- examination that he had no opportunity to discuss the cause of the incident with Bahadur. It was submitted on behalf of the respondent that the FIR was ante-timed. It was contended by the learned counsel for the respondent that the FIR is not in the handwriting of the informant, nor dictated by him. Girijesh Rai who wrote the FIR was not examined by the Court.

11. It is not possible to accept the criticism that P.W. 1 was not told by Bahadur about the quarrel but it is mentioned in the FIR. A closer look at the cross examination of P.W. 1 shows that the waiter did not tell him the cause of the quarrel. There is also no requirement that the FIR must be in the handwriting of the informant. Neither is it necessary to doubt the FIR because Girjesh Rai was not examined. The FIR has been otherwise proved in the evidence of the Police Officer (P.W. 7) who states that Himanshu Mohan Rai and Girjesh Rai came with a written report and he wrote the chik recorded as GD 1/005 on the FIR. This is supported by the deposition of P.W. 1 who referred to the handwriting of Girjesh Rai and his signatures and identified it on the Tehrir.

12. It cannot be inferred from any of the above circumstances that the FIR was ante-timed. Nor is it possible to disbelieve the timing of the FIR because the Police Constable went to the scene of crime and seized a shirt before the registration of the FIR at 23:05 hours i.e. at 22:00 hours. In fact, the police inspector (P.W. 6) stated in his evidence that he seized the shirt “around 10 in the night” and that he does not remember the exact time.

Ballistic Report does not confirm that the shots were fired from the recovered weapon

13. P.W. 6 made recovery of three khokha kartoos 0.32 bore in the presence of Bahadur and Krishna Kumar Singh. Evidently, there is no positive report from the ballistic expert and the report does not confirm that the shots were fired from the weapon that was recovered.

14. Apparently the police recovered a licensed gun from the accused Imran Afreen while he was boarding a train and the ballistic report showed that the licensed gun was not used for the killing. This means that the Police did not recover the actual weapon used for the killing and the accused had ample time to dispose off the weapon. It is however not possible to reject the credible ocular evidence of the eyewitness who witnessed the shooting and who are found be truthful.

15. It is possible that the prosecution may not recover the actual weapon in some cases. However, this cannot have the effect of discrediting reliable ocular testimony as we have here that the accused shot and killed the deceased, particularly when the lead bullets have been recovered and are found belonging to a commonly used 7.65 m.m. caliber i.e. .32 bore weapon.

In Anvaruddin vs. Shakoor[1], this Court considered the effect of obscure and oscillating evidence of the ballistic expert. The Court observed that:

> "10.....In this nebulous state of the evidence of the ballistic expert we are of the view that the High Court was wholly wrong in doubting the direct evidence of the three eye-witnesses on this ground. Where the expert evidence is obscure and oscillating, it is not proper to discredit the direct testimony of the eye-witnesses on such uncertain evidence. In such a situation unless the evidence of the eye-witnesses is shaken by some glaring infirmities, it would not be proper to doubt the correctness of their statements...." In the case of Brijpal Singh vs. State of M.P.[2], this Court observed that there was reliable ocular evidence of the accused having shot the deceased. However, the ballistic expert as in this case reported that though both the guns were found to have been discharged recently, the empty cartridges that were seized from the spot did not match the rifle that was recovered. This Court observed that normally, if the eyewitness's evidence is absolutely acceptable, then such evidence could be accepted even if there is some contradiction in the medical or ballistics reports. However, the oral evidence was not found acceptable in this case. In contrast, we find the oral evidence in the present case, particularly that of P.W. 1, to be completely acceptable and truthful. There is no iota of evidence on record which would suggest any motive on his part to falsely implicate the accused. We might add that there is no evidence as argued by the learned counsel for the respondent, that the police conspired to frame the accused who was a congress leader and had protested against police high handedness.
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> 16. In a different context, this Court in Gangabhavani vs. Rayapati Venkat Reddy and Ors[3]., observed that in case there is a contradiction between medical evidence and ocular evidence, the law is that though the ocular testimony of the eye witness has

> greater evidentiary value vis-à-vis medical evidence, where the medical evidence goes so far that it completely rules out all the possibility of the ocular evidence being true, the ocular evidence may be disbelieved. In the present case, the expert evidence to the effect that the empty cartridges which were found on the spot were not fired from the weapon that was recovered, does not really create a contradiction with the ocular evidence of P.W. 1 that the accused fired at the deceased with a gun and killed him. It so happens that the gun recovered by the police, turns out to be the gun that was not used. This creates no contradiction between the evidence of P.W. 1 and the ballistics report though broadly it may amount to a contradiction in the prosecution case.
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> 17. In this case, the ballistics report need not be rejected as untrue;

it simply states that the empty cartridges found at the scene of the crime were not fired from the gun recovered from the accused. But this had no bearing on the credibility of the deposition of P.W. 1 that the accused shot the deceased with a gun, particularly as it is corroborated by the bullets in the body. In this case we find it safe to accept the evidence of Himanshu Mohan Rai and disregard the apparent contradictions. We might add that the fact that accused shot the deceased with a gun is also corroborated by the testimony of P.W. 2.

18. It is not possible for us to accept the reasoning of the High Court on the basis of the minor doubts and technicalities that the judgment of the Sessions Court convicting and sentencing the accused for the murder of Lalit Mohan Rai has no legs to stand on. The judgment of the Sessions Court which had the advantage of watching the demeanor of the witnesses could not have been lightly set aside.

19. In such cases where the evidence of the eye witness has been found to be truthful and as in this case corroborated by the fact that the bullets were recovered from the body of the deceased, it is obvious that cannot have the effect of an acquittal.

20. This Court has held that an acquittal may undoubtedly be interfered with in certain circumstances. In Shivaji Sahabrao Bobade vs. State of Maharashtra[4], this Court held that:

> "6……The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand especial emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical systems of justice will then break down and lose credibility with the community. The evil of acquitting a guilty person light heartedly as a learned Author has sapiently observed, goes much beyond the

simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicted "persons" and more severe punishment of those who are found guilty. Thus, too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. For all these reasons it is true to say, with Viscount Simon, that "a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent ..." In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents....." In the case of State of U.P. vs. Anil Singh[5], the Court held as follows:

"17. It is also our experience that invariably the witnesses add embroidery to prosecution story, perhaps for the fear of being disbelieved. But that is no ground to throw the case overboard, if true, in the main. If there is a ring of truth in the main, the case should not be rejected. It is the duty of the court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence in the witnesses. It is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform."

21. We find that the facts and circumstances of this case warrant an interference with the acquittal of the accused. Accordingly, Criminal Appeal No.827 of 2011 and Criminal Appeal No.829 of 2011 are allowed. The judgment dated 22.04.2010 passed in Criminal Appeal No.8239 of 2008 by the High Court is set aside.

The respondent accused - Imran Afreen is convicted under Section 302 IPC and is hereby sentenced to undergo life imprisonment.

Accordingly, respondent No.2 - Imran Afreen is directed to surrender before the competent authority within a period of two weeks from today to undergo the remaining sentence.

.....J. [S.A. BOBDE] .....J. [L. NAGESWARA RAO] New Delhi March 07, 2017

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[1] (1990) 3 SCC 266
[2] (2003) 11 SCC 219 : (2004) SCC (Cri) 90
[3] (2014) 1 ACR 147
[4] (1973) 2 SCC 793

[5] (1988) Supp SCC 686