

## Mahendrapal And Anr. vs The State on 10 September, 1954

**Equivalent citations: AIR1955ALL328, 1955CRILJ892**

### JUDGMENT

Roy, J.

1. Mahendra Pal son of Mittar Singh, aged 19, by caste Brahmin, resident of village Bhojpur, within police circle Awagarh in district Etah, and Bhagwati Prasad son of Salig Ram, aged 40, by caste Brahmin, resident of village Memda within police circle Sidhpura in the same district, have been competed by the Sessions Judge of Etah under Section 302/34, I. P. C., for the murder of one Thakur Fateh Singh, a member of the U. P. Legislative Assembly on the night between July 1 and 2, 1953, at 2 A. M. in 'ahata' Ram-chandraniwas, at a distance of about one furlong from police station kotwali, Etah, by shooting him with a pistol in furtherance of the common intention of both. The actual shooting said to have been done by Mahendra Pal. Bhagwati Prasad is said to have been present by the side of Mahendra Pal armed with a lathi at the time of the occurrence giving Mahendra Pal "a moral support" as the learned Sessions Judge has found. The learned Sessions Judge awarded the sentence of death to Mahendra Pai and the sentence of transportation for life to Bhagwati Prasad. They have appealed against their conviction and sentence. There is also a reference by the learned Sessions Judge for the confirmation of the sentence of death.

2. Thakur Fateh Singh was a resident of Nagla Kans within police circle Awagarh, in district Etah. He gained a seat in the U. P. Legislative Assembly at the general elections held in 1952. He had taken a set of rooms in the enclosure known as 'ahata' Ramchandraniwas in the town of Etah. In that enclosure there is a cluster of houses occupied by various persons. The prosecution case was that in night in question Thakur Fateh Singh was sleeping in the open in that enclosure and close to him were sleeping his son Vikram. Singh, his friend Sardar Mahendra Singh, and his servant Surendra Singh, who were occupying as many 'charpoys' within close proximity to each other. It was alleged that at about 2 A. M. the two appellants came into the 'ahata'. Mahendra Pal having been armed with a pistol and Bhagwati Prasad with a lathi.

It was further alleged that on hearing the sound of the footsteps, Vikram Singh awoke and saw the two miscreants in the moonlight and in the light of an electric bulb of zero candle power that was burning as usual at a distance of seven feet from the cot of the deceased. It was further alleged that Mahendra Pal shot at Thakur Fateh Singh from very close quarters, hitting him on the right side of the chest and that death was instantaneous. It was also alleged that Surendra Singh (P. W. 5) and Sardar Mahendra Singh (P. W. 6) woke up and they saw the occurrence, namely, the shooting as also the retreat of the appellants. These facts were embodied in a written report Ext. P-2 that was lodged at the Kotwali by Vikram. Singh on the same night at 2-30 A. M. on the basis of which the first information report Ex. P3 was drawn up at the same hour.

3. The police arrived at the scene of occurrence shortly after the report and investigation was taken up. The post-mortem examination was conducted by the Civil Surgeon of Etah on 2-7-1953 at 8 in the morning. A gun shot wound  $1\frac{1}{3}$ " X  $1\frac{1}{4}$ " into chest cavity deep situate 3" below and  $1\frac{1}{4}$ " internal to the right nipple was found. The edges were contused and blackened. An area  $1\frac{1}{2}$ " X 1" around the wound showed blackening and tattooing. The wound was directed towards the left, slightly backward and upward. The bullet was found to have passed through the epigastrium fracturing the ziphisternum and injuring the liver and then passing through the heart, going into and lodging itself under the skin be-low the left arm-pit in posterior axillary line, Two tiny abrasions were present overlying the embedded bullet, and an area of ecchymosis  $2\frac{1}{4}$ " X  $1\frac{1}{2}$ " was present around the bullet. This elongated conical bullet was extracted out of the body.

On internal examination it was found that the left sixth rib was fractured in the mid-axillary line. The pleura was punctured on the left side and the cavity was full of blood. The left lung had a lacerated wound in the lower part of the upper lobe. The pericardium was punctured and was full of clotted and fluid blood. The heart had two wounds  $\frac{3}{4}$ " X  $\frac{2}{3}$ " each communicating with the other at the apex. The liver had a superficial contused wound  $1\frac{1}{2}$ " X  $\frac{1}{3}$ " on the upper part of the lobe. The stomach was found to contain 6 ounces of digested food. Death, according to medical evidence, took place at about 2 A. M. on account of shock and haemorrhage of the gun-shot wound, the firing having been made at a distance of one or two feet or even less. The medical evidence proved beyond doubt that Thakur Fateh Singh was shot at from very close quarters at 2 A. M. on the night between the 1st and 2nd of July, 1953, and that death ensued on that account.

4. The question in the present case is whether there is clear and satisfactory evidence to bring home the charge to the appellants beyond all shadow of doubt. The evidence against theme consisted of the testimony of a hotel keeper, by name Rawail Singh (P. W. 1), and another witness, by name Kaptan Singh (P. W. 2), who stated that in the evening of 1-7-1953, they saw the two appellants at the Kailash hotel, owned by Rawail Singh, where the two took their dinner on the same table, and also of the testimony of three eye-witnesses Vikram Singh (P. W. 3), Surendra Singh (P. W. 5) and Sardar Mahendra Singh (P. W. 6). The learned Sessions Judge did not attach any importance to the evidence of Rawail Singh and Kaptan Singh and held that their testimony was so unnatural and dis-

crepant that it cannot be said that the two ap-pellants dined at the Kailash hotel that evening.

The learned Sessions Judge, however, believed the three eye-witnesses and came to the conclusion that the prosecution case was proved to the hilt. We have examined that evidence with care and have given our anxious thought to the story told by the three eye-witnesses and we are of the opinion that their evidence lacks the impress of coherence and certainty which is essential to the establishment of a charge of murder beyond all reasonable doubt. The fact that the relations between the deceased and the appellants had been considerably strained for quite a long time admits of no doubt whatsoever. It is proved by positive evidence adduced on behalf of the prosecution and is also admitted by the accused themselves.

Mahendra Pal appellant is the nephew, and Bhagwati Prasad appellant is the mother's sister's son, of one Bam Chander Sharma. They are residents of two different villages. The former is a resident of

village Bhojpur which is within police circle Awagarh and the latter is a resident of village Memda which is within police circle Sidhpura. The relations between Thakur Fateh Singh and Ram Chander Sharma, which were previously cordial, got estranged about six years ago when litigation about some land between Thakur Fateh Singh on the one hand and one Smt. Sukhdevi on the other arose wherein Ram Chander Sharma actively helped Smt. Sukhdevi.

There was a case of theft of a cow brought against Ram Chandra Sharma and Mitter Singh the father of Mahendra Pal appellant, in which they were convicted by the trial Court. They suspected that Thakur Fateh Singh was instrumental in having that prosecution launched against them and in getting their conviction. This aggravated the bitterness between them. On 18-8-1952, an assault was made on Thakur Fateh Singh within the compound of the Etah Collectorate and in connection with that matter Ram Chander Sharma, Mahendra Pal appellant, Mitter Singh, Lochan Singh, Kunwar Pal and a sweeper were prosecuted under Section 307, I. P. C. While that case was pending Ram Chander Sharma was murdered and in that connection Udaibhan the nephew of Thakur Fateh Singh and Mithan Singh the servant of Thakur Fateh Singh and two others were prosecuted, After the murder of Ram Chander Sharma the two appellants, it is alleged, openly declared that they would avenge the murder of Ram Chander Sharma by murdering Fateh Singh. Subsequent to the murder of Ram Chander Sharma, the police initiated proceedings under Section 107, Criminal P. C., against the rival parties and it was during the pendency of those proceedings that the murder of Thakur Fateh Singh took place. Apparently there existed bitter enmity, but that enmity can be the motive for the crime as well as a motive for false implication. Under the circumstances the evidence filed on behalf of the prosecution has to be closely and carefully examined.

5. The two witnesses Rawail Singh and Kaptan Singh were produced to prove association of the two appellants and their having been seen together just near the scene of occurrence on the previous evening. The reason why the prosecution thought it necessary to produce this evidence is not far to seek. The two appellants, although related, live far from each other. Relationship by itself was not considered sufficient to bring them together to perpetrate this crime. It was, therefore, felt, that to make the matter against them doubly certain evidence was necessary to show that they met together and dined together in the evening in question at the Kailash Hotel.

A close scrutiny of the evidence of Uawail-Singh and Kaptan Singh will show that they are suborned witnesses, and they could not, and did not, see the two appellants together at the Kailash hotel. (After reviewing the deposition of Rawail Singh his Lordship referred to the improbability and inconsistency disclosed therein and with respect to the evidence of Kaptan Singh his Lordship concluded):

There can be no doubt whatsoever that Kaptan Singh was falsely introduced into the present story with a view to prove that although the two appellants lived quite apart they were seen together in the evening in question, lending support to the possibility of their combining and making common cause to put an end to the life of Thakur Fateh Singh.

The introduction of these two false witnesses into the case undermines to a considerable extent the rest of the texture of the evidence; and if the prosecution could introduce false element in the case, the 'ipse dixit' of the statement of the other witnesses cannot be accepted unless these witnesses can be said to have told the truth and to have corroborated the material facts which would go to establish the offence. The evidence of the eye-witnesses must, therefore, be put to closest scrutiny to see whether they can be safely relied upon.

6. As we have already said the three eye-witnesses are Vikram Singh (P. W. 3), Surendra Singh (P. W. 5) and Sardar Mahendra Singh (P. W. 6). We have gone through their evidence and not only do we find that the first information report is lacking in those material particulars which should have been expressed in it under the circumstances of the case, but the witnesses have told a story which creates a reasonable doubt that they did not actually see the culprit, whoever he might have been, before or at the time of firing and that they were awakened after the shot was discharged, and consequently there was just the possibility of their having failed to take a glimpse of the culprit or culprits who had been on their retreat, and, consequently these witnesses subsequently drew upon their imagination that the culprits were no other than the present appellants.

In the first information report it was not expressed that with the approach of the culprits and before the shot was fired. Vikram Singh woke up and challenged the miscreants by shouting "Who is there", nor was it expressed in the first information report that Sardar Mahendra Singh responded by saying: "What is it" -- both expressions conveying the full significance of the words, namely, that the sound of the footsteps was good enough to awaken Vikram Singh, and his shout was good enough to awaken Sardar Mahendra Singh, and that that shout, coupled with the Shout of Sardar Mahendra Singh that followed close upon the heels of the first shout, was sufficient enough to awaken Surendra Singh. The absence of the expression of the two shouts in the first information report might have in different circumstances been overlooked. But in the present case it cannot possibly be ignored that the whole case rests upon the slender feature which was thought very essential at the stage of evidence, namely, that the eye-witnesses were awake before the firing and had, therefore, had the full opportunity of seeing the culprits both at the time of the firing and also at the time of their retreat in spite of the suddenness and "swiftness of the action. The 'ahata' is 'kachha'. The alleged culprits came bare-footed. Manifestly they must have come on tiptoe; and they must have taken all precautions to avoid detection before actually killing the victim.

Vikram Singh, it may be said, awakened only fortuitously, which too is indeed very doubtful. But did he shout and did he awaken the other two persons who were sleeping by his side before the shot was fired. Vikram Singh gave different versions on this question. He at first said that when the shot was fired Sardar Mahendra Singh and Surendra Singh awoke on hearing the report of the shot. He changed this statement immediately and said that they got up before the firing. He again reverted to his earlier statement, namely, that they awoke on hearing the report of the gun-shot. The witness was then asked to clarify what exactly was the situation; and he said that the whole of the occurrence took place within the "fraction of a second" and the two witnesses Sardar Mahendra Singh and Surendra Singh had been awakened before the firing was done. This evidence does not inspire confidence.

Sardar Mahendra Singh's version viz., that when Vikram Singh shouted: "Who is there", he responded: "What is it", is not supported by the other two witnesses. Then again the claim of Surendra Singh that he shouted and chased the culprits when they were running away up to about 20 paces is open to serious doubt. According to his own version he was afraid to follow the culprits least he may be shot at himself. If the fear was there, he could not have mustered up courage initially to follow the culprits and to give them a chase even up to a distance of about 20 paces. The first information report' is conspicuous by the absence of the factum of chase.

The omission in the first information report of the alleged "shouts" and "chase" has been explained by Vikram Singh upon the hypothesis that they were innocent omissions due to his having been in a hurry to make out the report. It is of course not necessary that a first information report should give every detail which is given in evidence at the trial. But where a first information report is made by one who professed to be an eye-witness to the occurrence and he fur-

ther professed to give essential details of the occurrence, the absence of certain essential features must be based upon good and reasonable hypothesis. The first information report is a valuable document and the accused is entitled to make use of it to protect his own interest by cross-examining the prosecution witnesses with reference to additions and alterations in the story which might subsequently be made in evidence. In the present case the two essential elements of "shouting" and "chasing" were purposeful additions made in evidence; and if these are open to reasonable doubt, it becomes, further doubtful whether the eye-witnesses were really in a position to identify the culprits.

7. The ahata was occupied by a number of persons, apart from the deceased and the eyewitnesses, and it is in evidence that they were sleeping there. It is further in evidence that those persons came up immediately after and it is alleged that they were informed by the eye-witnesses as to who the two culprits had been, namely, the two appellants. Amongst those persons were Onkar Nath Tewari, an Assistant Public Prosecutor, Rajendra Singh Amin, Bhagwat Singh and certain others. These persons were not produced as witnesses in the case. They were, however, examined by the investigating Officer on 2-7-1953, as stated by him. Their non-production has been explained upon the hypothesis that they did not actually see the culprits.

Assuming that they did not, their evidence was material, not with a view to prove the actual fact of murder, which was 'in issue', but to prove the 'relevant fact' namely, that just after the event the eye-witnesses disclosed the names of the culprits to those who came -----, this relevant fact having been so connected with the fact in issue in view of Section 6, illustration (a), Evidence Act, as to have necessitated the giving of evidence on that relevant fact itself as required by Section 5 of that Act. Section 5, Evidence Act, says that evidence may be given of the existence or non-existence of every fact in issue and of such other facts as are declared in the Act itself to be relevant.

Section 6, Evidence Act, says that facts, which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant whether they occur at the same time and place or at different times and places. Illustration (a) of that section makes it clear that where A is accused of the murder of B by beating him, whatever was said or done by A to B, or by the

bystanders, at the beating, or so shortly before or after it as to form part of the transaction is a relevant fact.

Vikram Singh P. W. 3 stated that after the accused ran away he told Onkar Nath Tewari and the other persons who came there that the two appellants were the culprits and had been seen by him committing the crime. If that was so, and if those persons had been examined by the police at the time of the investigation on 2-7-1953, their evidence to prove that relevant fact assumed considerable importance. On this part of the case the learned Sessions Judge observed as follows:

"It has been vehemently urged by the learned counsel for the accused that there were several other persons sleeping at a short distance from the cot of Thakur Fateh Singh and as they were independent witnesses, they should have been produced by the prosecution to corroborate the statement of the eye-witnesses. The evidence shows that those witnesses consisting of Sri Tiwari, A. P. P., Sri Pandey and Sri Bhagat Singh and an Amin came to the spot only after the accused had made good their escape. Even if these four witnesses had been aroused by the report of the gun-shot, the most that these four witnesses could have seen was the backs of the accused who were running away and it could not have been possible for these witnesses to see the faces of the assailants or to recognise or identify them. These witnesses, therefore, were more or less unnecessary witnesses and hence their non-production does not affect the prosecution case at all.

It has been urged that these witnesses should have been produced in order to corroborate the statement of the prosecution witnesses that they had told these witnesses the names of the assailants immediately after the incident. It would no doubt have given the prosecution more support if these witnesses had been produced and if they had stated that the three eye-witnesses told them immediately after the incident that the assailants were the two accused, but if these witnesses had been produced, the defence would have come forward with the objection that Sri Tiwari is an Assistant Public Prosecutor and hence he should not be believed, that Rajendra Singh Amin who was sleeping about 63 feet away should not be believed because the Collector had taken a keen interest in the case and had gone immediately to the spot in the night of the occurrence and hence he was bound to support the prosecution, while Pandey and Bhagat Singh are residents of the Ahata and were bound to be friendly with Thakur Fateh Singh."

We cannot fully subscribe to this line of reasoning adopted by the learned Sessions Judge who drew largely upon his imagination and took a narrow view of the provisions of Sections 5 and 6, Evidence Act, under which the evidence of those witnesses could have been relevant, and who failed to take note of Section 114, Illustration (g), Evidence Act, namely, that evidence which could be produced and is not produced would, if produced, "be unfavourable to the person who withholds it. (8) It is not disputed that Vikram Singh, Suren-dra Singh and Sardar Mahehdra Singh, prosecution witnesses were sleeping in the 'ahata' close to Thakur Fateh Singh when this murder was committed at 2 a. m. These witnesses were closely related to, or associated with, the deceased. One was the son

of the deceased. The other was a bosom friend of the deceased. And the third was a servant of the deceased who had been given protection by the deceased in his hour of distress when he as a warder in the jail at Etah came under clouds and had been suspended and had also been threatened with a prosecution for theft. The mere ground that these witnesses were so closely related to, or associated with, the deceased would, of course be no ground for doubting their testimony.

As has been observed by the Supreme Court in

-- 'Dalip Singh v. State of Punjab', AIR 1953 SC 364 (A), ordinarily a close relative would be the last person to screen the real culprit and falsely Implicate an innocent person, and hence the mere fact of relationship far from being the foundation for criticism of the evidence is often a sure guarantee of truth; but no sweeping generalisation can be made and there can be no general rule of prudence to require corroboration before the evidence is believed and each case must be limited to and governed by its own facts. The Evidence Act does not purport to lay down any rule as to the weight to be attached to the evidence when admitted. Nor is any such rule possible.

The proper appreciation of evidence is a matter of experience, common sense and knowledge of human affairs. For weighing evidence and drawing inferences from it there can be no canon. Each case presents its own peculiarities and common sense and shrewdness must be brought to bear upon the facts elicited in every case which a Judge of facts in. this country discharging the functions of a jury in England has to weigh and decide. We fully agree with these observations which were made by Birch J. In -- 'Queen v. Madhub Chunder', 21 Suth WR (CD 13 at p. 19 (B).

According to Wigmore the common law in repudiating the numerical system lays down four general principles. Firstly, credibility does not depend on number of witnesses. Secondly, in general, the testimony of a single witness, no matter what the issue, or who the person, may legally suffice as evidence upon which the Jury may find a verdict. Thirdly, conversely, the mere assertion of any witness does not of itself need to be believed even though he is unimpeached in any manner because to require such belief would be to give a quantitative and impersonal measure to testimony. And, fourthly, as a corollary of the first proposition all rules requiring two witnesses, or a corroboration of one witness, are exceptions to the general principle.

9. It follows, therefore, that in determining on the credit due to the witness regard must be had to the following considerations, namely, their integrity their ability, their number and consistency with each other, the conformity of their testimony with experience, the conformity of their testimony with collateral circumstances. Judged by these standards the evidence of the three eye-witnesses in the case is not such as may safely be relied upon, or as may inspire that amount of confidence which may bring one to the only categorical conclusion that the crime had been committed by the appellants and by no other. In the present case these witnesses have demonstrated themselves to be prone to lies on essential particulars. And because of their general unreliability and for the reasons which we have already stated, and also for other reasons which we are shortly going to state, we are not prepared to believe them when they have said that they saw the culprits in action and also in flight.

10. It is said that the two appellants had given threat to Thakur Fateh Singh that they would put him to death. Evidence on that point is contained in the statement of Vikram Singh alone. (Here the evidence given by Vikram Singh and Surendra Singh was discussed and his Lordship concluded that it would be wholly unsafe to rely upon these witnesses in order to come to a categorical finding that the pistol was discharged-

ed by Mahendra Pal appellant and that the other appellant Bhagwati Prasad was noticed there armed with lathi giving "moral support" to Mahendra Pal as the learned Sessions Judge observed).

11. In spite of the expedition that had been adopted in the making of the first information report the learned Sessions Judge had a lurking doubt in his mind about the genuineness of the story told by Vikram Singh which may be traced from the following observation made by him in his judgment:

"On the other hand, as there was subsisting enmity between the two parties and as Vikram Singh had been told by his father that Mahendra Pal had given out a threat that he would avenge the murder of Ram Chander Sharma by the murder of Thakur Pateh Singh, it would be natural for Vikram Singh to apprehend that such an act might be committed by Mahendra Pal. Under such circumstances, therefore, if it transpired that Vikram Singh did not actually see the murderers himself, this knowledge that Mahendra Pal had given out such a threat would be likely to make Vikram Singh believe that the murder was committed by Mahendra Pal, and this could be a good reason for Vikram Singh to implicate, Mahendra Pal as the murderer, if in case he had not -actually seen and recognised the assailants."

12. If Vikram Singh was labouring under an apprehension such as this, as was visualised by the learned Sessions Judge, when he implicated Mahendra Pal in this crime, his imagination would not be proof of the fact that Mahendra Pal was really the culprit. We must make it clear that we are not doubting the evidence of the three eye-witnesses on the ground of the kinship to, or friendship with, the deceased. We doubt their evidence by reason of their general unreliability and also by reason of the fact that under the circumstances of the case the probabilities are that they were not in a position to see the culprits before the culprits had made good their escape.

It may be added that before writing the first information report and even after writing it but before going to the Thana Vikram Singh did not, as has been stated by him, ask any of the persons who had come to the spot whether they had seen the assailants firing or running away. It is curious indeed that although he was the son of the deceased and was going to make the FIR he did not even care to ascertain the names of the persons who might have seen the attack or who might have provided valuable evidence in support of the case. The name of Mahendra Singh and Surendra Singh came in the first information report because according to Vikram Singh they happened to volunteer themselves that they had seen the occurrence.

13. The site-plan that was prepared in the case, which is part of the record, brings out the features of the locality and it would not be necessary for us to detail those features. It may, how-over, be noted that the position, where the two miscreants stood is not shown in the site-plan. The investigating



officer stated in court that he did not mention the position occupied by the two miscreants in the site plan. The position taken by them was not even expressed in the FIR. This might be because it was not thought proper to commit and pin down the prosecution to any definite case till the medical evidence had been received. For the first time it was disclosed in evidence that Mahendra Pal stood adjacent to the bed. This was done after the medical evidence had been received showing that the shot was fired from a close range. At any rate, the investigating officer should have realised the importance of this point and the fact that he has not shown it in the site-plan leads to a presumption that it was not disclosed to him from what distance the shot was fired.

14. The two appellants denied having committed this murder. They further denied that any threat had ever been given by them to kill Fateh Singh. They further denied that they were at the Kailash hotel on the evening prior to the occurrence. They contended that they had been implicated on account of enmity. Three witnesses were examined on the side of defence. They were Bishambar Dayal, Chandra Pal and Raghubar Dayal. It would not be necessary for us to go into the merits of the evidence of these defence witnesses. The prosecution must stand upon its own legs and not upon the weakness of the defence.

15. In our opinion it would be unsafe to base the conviction of the appellants upon the evidence that was produced in the case. At any rate, there is room for reasonable doubt and the appellants are entitled to that benefit. It is really unfortunate that a murder of this nature goes undetected and unpunished. But the responsibility for that sorry state of affairs must be shared equally by the faulty nature of the investigation and the presentation of the case in court and also by an anxiety on the part of the alleged eye-witnesses to prevaricate and to withhold the truth. Accordingly we allow the appeal, set aside the conviction and sentence of the appellants and direct that they be set at liberty at once unless wanted in any other matter. The reference is rejected.