

## **Maiku And Ors. vs State Of U.P. on 29 September, 1988**

**Equivalent citations: AIR1989SC67, 1988(3)CRIMES638(SC), JT1988(4)SC73, 1988(2)SCALE1150, 1989SUPP(1)SCC25, AIR 1989 SUPREME COURT 67, 1988 (18) REPORTS 78, 1988 CRIAPPR(SC) 253, 1988 BBCJ 168, 1988 (4) JT 73, 1989 SCC(CRI) 251, 1989 CALCRILR 50, 1989 SCC(CRI) 117, 1989 CHANDLR(CIV&CRI) 440, (1989) CHANDCRIC 112, (1989) EASTCRIC 251, (1988) ALLCRIC 163, (1988) 3 CRIMES 638**

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**Bench: G.L. Oza, K. Jagannatha Shetty Shetty**

### **JUDGMENT**

G.L. Oza, J.

1. These appeals by special leave have been filed by the appellants against their conviction under Sections 147, Section 325/149, Section 330/149 and Section 354/149 I.P.C. and sentenced to undergo various terms of imprisonment between two to five years for these offences. Appellant Mullu has been further convicted under Section 342/149 I.P.C. and sentenced to undergo two years' R.I. The remaining five appellants have been convicted under Section 220/149 I.P.C. and each sentenced to undergo five years' R.I. Sarjoo Singh, appellant has been further convicted under Section 218/149 and sentenced to undergo three years' R.I. for that offence. All these sentences are to run concurrently.

2. The prosecution case was that sometime on the night between 12th and 13th March, 1967 a burglary is alleged to have been committed at the house of one Pitam in the village Adilpur under Police Station Kotwali Sitapur. A bicycle and other articles of total value of about Rs. 932/- were taken away by the burglars. About this theft Pitam lodged a report at the Police Station at about 5.30 p.m. on 13th March, 1967 and a case under Section 457 I.P.C. was registered against unknown persons. Sarjoo Singh, the present appellant was at that time posted as Sub-Inspector of Police at Police Station Kotwali and Ram Sunder Singh, Ram Chander Pandey and Ishtiaq Hussain appellants were as Constables. Maiku appellant was a Police Chowkidar in the circle within which the village Adilpur was situated whereas Mullu appellant is a resident of that village. SI Sarjoo Singh accompanied by Constable Ram Sunder Singh and Ishtiaq Hussain had already left the Police Station on 12th March, 1967, according to the entries made in the General Diary, in connection with the investigation of another Crime No. 248. The Head Constable who registered the present case i.e. Crime No. 252 on the basis of Pitam's report sent the papers alongwith the report relating to the case to SI Sarjoo Singh. The Constable handed over the same to SI Sarjoo Singh. SI Sarjoo Singh

accompanied by aforesaid three Constables went to the Village Adilpur for investigation of the case relating to the theft committed at Pitam's house.

3. On 15.3.67 SI Sarjoo Singh sent a note Ex. K-a to the Head Moharier intimating that an unlicensed pistol and two cartridges were recovered from the possession of one Zalim PW 1. The Head Moharier registered a case against Zalim under the Arms Act as Crime No. 258 in the general diary of the Police Station. The copy of this entry is Ex. K-3. Another Ex. K-4 was sent by SI Sarjoo Singh to Head Moharier on 15.3.67 intimating that Bharat accused was arrested with the bicycle stolen from Pitam's house. On being interrogated he confessed his complicity in the theft alongwith one Babu and four others. It was further revealed by him that he and his companions had committed the murder of Pitam's brother Sitaram and thrown away his dead body in the bank of the river near village Sakrara. He also volunteered to get the dead body recovered. When the police party was taking him towards village Sakrara, he made a desire to ease himself. He was permitted to do so under the watch of Ram Sunder Singh, while he was so doing he attempted to run away. When Ram Sunder Singh Constable managed to apprehend him, he bit at the thigh of Ram Sunder Singh who raised an alarm. The alarm attracted some persons who attempted to apprehend Bharat, but he wielded a lathi. He was, however, overpowered after giving a beating but he soon died on the spot. The Head Moharier made a note in the general diary of the Police Station a copy of which entry is Ex. K-5. On 16.3.67 SI Sarjoo Singh deposited the recovered bicycle at the Police Station in the morning at 8.45 A.M.

4. On 15.3.1967 Indal, a brother of deceased Bharat moved an application Ex. K-9 before the Superintendent of Police, Sitapur informing him that SI Sarjoo Singh and three constables had gone to his village to investigate that theft committed at Pitam's house. They assaulted Sitaram's sister-in-law Ramdei whereupon she wrongly named some person as accused. Sub-Inspector and his companions assaulted and took Bharat towards the village Sakrara where he was beaten to death. Sub-Inspector and the constables then approached the village people and wanted to be pardoned but the village people refused to oblige them.

5. The matter was inquired into by the Magistrate. On the basis of this report lodged by Indal who found Indal's complaint to be correct, the S. P. Police Sitapur on 14.5.68 got the case registered under Section 302 and the investigation was handed over to the UP CID. In the course of investigation on 27.10.68 Sh. Shankar Singh, interrogated Zalim and Indal PW 1 and PW 2 and on 29.10.68 he interrogated Lachhman, Maiku, Ganpat and 13 others. On 30.10.68, Mangoolal and others were interrogated. On 11.12.68 Smt. Ramdei was interrogated and on 19.2.69 one Jhabboo was interrogated. On 2.5.70 the IO gave a report for identification of the three constables and on 25.9.70 permission was taken to file the prosecution against the Sub-Inspector and constables and ultimately on 10.6.71 chargesheet was filed on the basis of which the case was committed to Court of Sessions. The learned Sessions Judge passed his judgment on 1.3.75 convicting the appellant. On appeal the High Court by judgment dated 26.5.78 maintained the conviction partly and altered the conviction of the appellants from Section 304/149 to Section 325/149. It is against this that after grant of leave these appeals are before us.

6. The appellants pleaded not guilty to the charges framed against them and denied the commission of alleged offences. Ram Sunder and Ishtiaq Hussain denied that fact that they accompanied SI Sarjoo Singh at the time of investigation of the case relating to the theft at Pitam's house. SI Sarjoo Singh asserted that he had recovered a pistol and ammunition from Zalim and he was falsely implicated as the family of Zalim was annoyed with him. About the death of Bharat, this SI pleaded that the death took place under the circumstances as mentioned by him in the note which was sent to the police station immediately after the incident. Constable Ran Sunder took up the same plea which was taken by SI Sarjoo Singh. Maiku and Mullu appellants maintained that CID people wanted them to support the prosecution theory and they were interrogated but when they did not support the theory they were falsely implicated. One Chakardin who was a witness for the memo of alleged recovery of the bicycle from Bharat's possession was examined by the accused persons in their defence.

7. The learned Sessions Judge and the High Court accepting the testimony of the prosecution witnesses convicted the appellants mentioned above in the manner as indicated earlier.

8. Before us, it was contended by learned counsel for the appellants that in this case even according to the theory of prosecution it is not possible to convict the appellants for an offence under Section 147 or for any other offence with aid of Section 149. It was contended that in fact the information given to the Sub-Inspector was that Sitaram has been done to death and his body was thrown in the river and it was in pursuance of that information that accused Bharat suspected for the offence was taken in that direction. It was also contended for the appellants that the prosecution story as has been brought out at trial disclose that the incident has developed at different places and times and it could not be said that the whole incident resulting in the death of Bharat was one.

9. The fact remains that a cycle was recovered although prosecution now suggests that it was not recovered from the custody of Bharat but was recovered from the field. It is also clear that a pistol alongwith cartridges were recovered and sent to the Police Station although now it is alleged that a final report was submitted about that offence. Under these circumstances it was contended that it could not be disputed that a report about theft at Pitam's house was sent to appellant Sarjoo Singh Sub-Inspector for investigation and during investigation it was also disclosed that one Sitaram has been done to death. Now it is alleged by the prosecution and it is not disputed that this Sitaram is alive but there is no material to indicate that during the investigation at the relevant time it was clearly stated to the Investigating Officer by any one of the persons that Sitaram has not been killed and is alive. It is also contended by the learned counsel that in view of the dates mentioned above it is clear that the investigation in this case started after a long lapse of time. The report by Indal was on 16.3.67. On 14.5.68 case was registered and investigation commenced. For the first time a statement of witness was recorded more than a year after. Therefore it would not at all be safe to rely on the testimony of these witnesses. There is no independent corroboration of their testimony. It was urged that it would be unsafe to sustain the conviction of the appellants.

10. We have heard learned counsel for the parties and have gone through the evidence in detail. It is clear that a report about theft at the house of Pitarn was recorded at the Police Station on 13.3.67 and this report was sent by the Head Constable to the SI for investigation as the SI was already in

the area. It also could not be disputed that on 15.3.67 a pistol and cartridges were recovered although whether there is a dispute as to recovery from Zaim PW 1, but they were recovered and sent to the Police Station along with the report. Thereafter the Sub-Inspector was pursuing the investigation in respect of facts and during this investigation he was informed that Sitaram has been done to death and his body was thrown away. It is therefore clear that for the purpose of search of dead body of Sitaram, the Police Officer was pursuing the investigation. It is also clear that at various stages during the progress of investigation report was sent by the Sub-Inspector at the Police Station.

11. Now according to the prosecution, this was not the true version but it must be clearly understood that unless the prosecution is able to 'establish its case beyond doubt it could not be said that the earlier version of the present appellants which was sent to the Police Station was not a probable. Since the prosecution is not able to establish the case beyond doubt, the appellants are entitled to advantage thereof.

12. As discussed above it is clear that this Sub Inspector was pursuing investigation which is his duty and therefore it could not be said that while he was pursuing the investigation, it was in pursuance of an unlawful object. Therefore Section 147 or 149 IPC could not be attracted. Even according to the prosecution the Sub Inspector was pursuing the investigation to search the articles stolen from the house of Pitam in the course of which he was informed that Sitaram was killed and he wanted to recover the dead body. While pursuing the investigation the appellants resorted to violence. The object was either to recover the dead body of Sitaram or to recover the stolen property of Pitam. This object apparently could not be said to be an unlawful object and therefore these appellants could not be convicted under Section 147. The High Court appears to have ignored this aspect of the matter. It is also clear that if these appellants could not be convicted for an offence under Section 147, they also could not be convicted under any Section of the Penal Code with the aid of Section 149. The conviction of these appellants under Section 147 and with aid of Section 149 could not therefore be sustained.

13. It will now be necessary for us to examine the individual act of each of the accused person to find out their culpability. In this context, if we examine the evidence in the case it is rather interesting. So far as killing of Bharat is concerned the prosecution evidence itself is not clear who was responsible for the offence. The only allegation is that he has gone towards the river and there he was found lying injured. The injuries on the body of this person indicate that they are injuries by hard and blunt object, but nothing on any vital part of the body. It is also clear from the medical evidence that none of the injuries could be said to be sufficient in the ordinary course of nature to cause death. Quite naturally, the High Court felt that anyone who is responsible for causing these injuries could not be convicted for anything more than Section 325. But as it was not possible to convict any particular individual for inflicting any of those injuries, the High Court with the aid of Section 149 convicted all the appellants. But as discussed above as no one could be convicted with the aid of Section 149 it will be necessary to find out who inflicted what injury on the person of Bharat? If we examine the evidence and also the contradictions made by the witnesses with their earlier statements it is difficult to come to any conclusion in respect of injuries to Bharat. As regards injuries to others hit will be clear from the evidence of PW 1 Zaim that although in his examination

he has stated about injuries being inflicted on him and also the fact that he was hit on his leg but in cross examination he admitted that he has not in his statement during investigation made such a statement.

14. Immediately after the incident the earliest version is the report (application given by Indal) on 16.3.67. But during the cross-examination this witness stated that in the report he has mentioned certain facts which were noticed by him, certain facts about which he had heard and certain facts he omitted to mention. He said that incident of inserting chillies in the private part of Ramdei was seen by him but then admitted that in this report made by him it has not been mentioned. This is what he said in cross-examination :

It is correct to say that I got written in the application some facts which I saw myself, some of them which I heard. The insertion of chillies in the vagina of Ramdei was seen by my own eyes. I have not stated that I have seen the insertion of chillies in the vagina.

This statement by Indal who is alleged to have made the application which is the foundation of the prosecution makes it clear that he had not stated in that application what he personally saw. This part of omission is an important aspect of the prosecution version. Under these circumstances this evidence of the prosecution witnesses who for the first time were examined more than a year after the incident is hard to believe. In our opinion it would not be safe to rely on the testimony of these witnesses. As stated above even going through the evidence of these witnesses, it is very difficult to come to a conclusion about the individual acts of each of the accused. The general nature of evidence is that torture was done. They were harassed under the guidance of the Investigating Officer i.e. the appellant Sub Inspector Sarjoo Singh, but there is no precise statement about what injuries were caused to what person and by whom.

15. It is true that Bharat has lost his life. It is also true that he had some injuries by hard and blunt weapon on his body but it is not clear under what circumstances it happened and how present appellant Sub Inspector Sarjoo Singh could be connected with those injuries.

16. As regards the incident of Ramdei, neither the Sub-Inspector nor any of the Constables was alleged to have been responsible for the alleged story of introduction of powdered chillies in her private part. According to her, Maiku Chowkidar took the chillies in powder form and Mullu put the chillies in the vagina. In her cross-examination she herself admitted that she did not tell about the incident to anyone. She told about it to the CID Inspector after 1½ years or 2 years after the incident. She also said that she had no injury mark and that she was not medically examined. On the basis of this evidence coupled with what Indal stated in his application no one could be convicted for the alleged offence against the appellants. The investigation conducted is perfunctory and casual. As indicated earlier on 16.3.67 Indal PW 2 gave a written application and it was on 14.5.68 more than a year after that, a case was registered on the basis of that application. Ultimately the charge-sheet was filed on 10.6.1971. These circumstances go a long way to discredit the prosecution version.

17. In the result, the appeals are allowed and the conviction and sentence passed against all the appellants are set aside.