

A

STATE OF U.P.  
v.  
SIKANDER ALI AND ORS.

APRIL 3, 1998

B

[M.M. PUNCCHI, CJ., K.T. THOMAS AND  
S. RAJENDRA BABU, JJ.]

*Criminal Law :*

*Indian Penal Code, 1860 :*

C

*Section 302—Murder—Two persons shot dead—FIR Lodged giving vivid details including names of the assailants and witness—Conviction by Trial Court—Sentenced to death—Reappreciation of Evidence—On appeal, sentence of death set-aside by High Court—Held : High Court should not have disturbed the finding of trial court's order—Conviction of the accused*

D

*restored—However, sentence of death commuted to imprisonment for life.*

*Criminal Procedure 1973:*

*Section 161—Delay of 24 days in examining the eye witness—IO's involvement in other duties relating to the upkeep of law and order—Held: Lapse of the investigation should not prevent the court from accepting eye witnesses' evidence, if it is otherwise truthful.*

E

**The accused - respondents, were prosecuted under section 302 IPC. FIR was lodged by the eye witness [PW1] with vivid details of the occurrence including full identity of the assailants and witness [PW2], within an hour of occurrence.**

F

**On the basis of the evidence of PW1 and PW2 , the trial court convicted the accused-respondents under section 302 IPC and sentenced them to death.**

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**On appeal, the High Court, reappreciating the evidence under Sections 391 and 311 of the Criminal Procedure Code acquitted the accused. Hence this appeal by State.**

H

**On behalf of the appellant, it was contended that the evidence of PW1 and PW2 should have been assessed on its own worth and further contended that the appellate court has committed a grave error in knocking it off on**

the fragile premise that the police officer did not identify PW1 and PW2 at the spot. A

Disposing of the appeal, this Court

**HELD :** 1.1. The High Court committed a serious error in using the omission of the field officer in noticing the kith and kin of the deceased in the crowd for jettisoning the strong evidence of PW1 and PW2. The trial court has rightly believed the testimony of PW1 and PW2 and the High Court should not have disturbed that finding. [663-B] B

1.2. Failure of the Police Officer to examine PW2 for twenty four days should not have been used to drop his evidence out. Investigating officer said he was unable to question PW2 earlier as he himself was very much involved in other duties relating to the upkeep of law and order. Thus, lapse of the investigation should not prevent the court from accepting the eye witnesses evidence if it is otherwise truthful. [662-B] C

*Ranbir and ors. v. State of Punjab, AIR (1973) SC 1409 and Ganesh Bhawan Patel and another v. State of Maharastra, AIR (1979) SC 135, referred.* D

2. In the instant case, there is no warrant for awarding death penalty to the accused. Ends of justice would be met by sentencing them each to imprisonment for life. [663-C] E

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 656 of 1990.

From the Judgment and Order dated 26.4.90 of the Allahabad High Court in Crl. A. No. 1475 of 1988. F

Vishwajit Singh and A.S. Pundir for the Appellant.

A.K. Ganguli (A.C.) and Dileep Tandon for the Respondents.

The Judgment of the Court was delivered by G

**THOMAS, J.** The place of occurrence of this double murder case is within the vicinity of the Sessions Court of Allahabad. Victims of the murder were inter se brothers-in-law and the alleged murderers were also like that. One of the victims was facing trial in another murder case at the same H

A Sessions Court and with his murder the said trial stood abated in that case. But the trial in the present case passed through all the stages and the sessions court convicted the two accused of murder and death penalty was imposed on them. The High Court of Allahabad on appeal acquitted them both. So the State of U.P. has come up with this appeal by special leave.

B Murder for murder was the motivation for the occurrence as per the prosecution case. Synopsis of this case is that a man named Pappu (who was the brother of first accused Sikandar Ali) was slain about a year prior to the incident in this case, and police had challenged Shamsher Singh alies Niley (one of the deceased) as an accused in that murder case along with some

C others. That case was committed to the court of sessions and the trial was proceeding before the sessions court. There was a posting of the case on 16.7.1986 on which day the deceased Shamsher Singh went to the sessions court in the company of his brother-in-law Ramji Tripathi (the other deceased in this case), his brother Avtar Singh (PW-1) and father Harnam Singh (PW-2). As the court adjourned the case to another date the parties and those who

D escorted them dispersed from the precincts of the court. While the two deceased rode on a scooter PW-1 and PW-2 were on foot. They first passed the Treasury Gate and when the scooter turned to the right side of the road the two assailants, who were in ambush behind the compound wall, stretched up and fired from their pistols at the scooterist and his pillion rider. Both fell

E down on the road and the appellants fled from the scene and escaped in spite of a chase made by Avtar Singh.

F Shamsher Singh died at the spot. The other injured (Ramji) was taken to the hospital in a police jeep but he too did not survive long due to fatal bullet injuries sustained. PW-1 Avtar Singh went to the nearby police station and lodged FIR at 1.15 P.M.

G The trial court, relying on the testimony of PW-1 and PW-2 came to the conclusion that assailants of the two victims were the accused in this case. Hence, they were convicted and sentenced to death. Reference made by the Sessions Judge for confirmation of the death sentence was considered along with the appeals filed by the two accused and by the judgement under appeal learned Judges of the High Court have set aside the conviction and sentence.

H High Court declined to rely on the testimony of PW-1 and PW-2 mainly on the strength of the evidence collected by the High Court under Section 391 read with section 311 of the Code of Criminal Procedure. Such a course was adopted by the High Court when it noticed that a police jeep had reached

the spot of occurrence soon after the incident in which vehicle injured Ramji was rushed to the nearest hospital. Learned Judges therefore felt that examination of the said police officer was of vital importance in this case particularly for appreciating the evidence of the eye-witnesses.

Shri Ram Praskash Tandon, the 3rd Field Officer (Police) was thus summoned by the High Court for examination. In his evidence Shri Tandon said that while perambulating around the area he reached the spot and found two injured persons lying on the road, one of them was already dead and the other was not yet dead and that the surviving person was rushed to Sir Tej Bahaudar Sapru Hospital and then he returned to the place of occurrence again.

High Court thought if PW-1 Avtar Singh who is the real brother of one of the victims and PW-2 Harnam Singh being his father were present at the scene it would not have escaped the notice of the police officer. Learned Judges further pointed out that as PW-2 Harnam Singh was questioned by PW-4 (the investigating officer) only after twenty four days of the occurrence much of the evidentiary value of his testimony has eroded. Consequently, the High Court declined to act on the testimony of PW-1 and PW-2.

Learned counsel for the State of U.P. contended that evidence of the two eye-witnesses should have been assessed on its own worth and the High Court has committed a grave error in knocking it off on the fragile premise that the police officer did not identify them at the spot.

Shri Ram Prakash Tandon has further stated in his evidence that he happened to stop at the place of occurrence as he found a crowd thronging there and he learned that two persons were shot by two killers. After rushing the injured, who was still alive to the hospital he came back to the scene and by that time the local police were making Panchnama. Shri Tandon said that he did not bother himself to know whether relatives of the injured were present or whether any one was weeping at that place. Nobody told him the name and addresses of the injured, but he heard then the the dead person was Sardarji and name of the injured was Ramji whom he carried to the hospital and his killer was one Sikandar.

How could it be inferred from the evidence of Shri Tandon that PW-1 Avtar Singh and PW-2 Harnam Singh could not have seen the occurrence? It must be remembered that Shri Tandon did not know those persons earlier and hence there is not question of his identifying them at the spot. Secondly he

A briskly got himself engaged in the task to save the remaining injured. If so, it was not the occasion to waste his time for enquiring as to who among the crowd would have been the kith and kin of the victims.

B Failure of the police officer to examine PW-2 Harnam Singh for twenty four days should not have been used to drop his evidence out. Investigating officer said that he was unable to question PW-2 earlier as he himself was very much involved in other duties relating to the upkeep of law and order. This Court has repeatedly cautioned that lapse of the investigation should not prevent the court from accepting the eye-witnesses' evidence if it is otherwise truthful.

C It has been observed in *Ranbir and others v. State of Punjab*, AIR (1973) SC 1409 that "the question of delay in examining a witness during investigation is material only if it is indicative and suggestive of some unfair practice by the investigating agency for the purpose of introducing a got up witness to falsely support the prosecution case." In *Ganesh Bhavan Patal and another v. State of Maharashtra*, AIR (1979) SC 135 a three-Judge Bench of this Court observed that delay in questioning a witness by itself cannot amount to any serious infirmity in the prosecution case. "But it may assume such a character if there are concomitant circumstances to suggest that the investigator was deliberately marking time with a view to decide about the shape to be given to the case and the eye witness to be introduced."

E While dealing with the evidence of PW-1 we cannot overlook a striking feature that his version regarding occurrence gained entry in police records within an hour of occurrence. Ex. K.17 is the FIR which was recorded at 1.15 P.M. on 16.7.1986. There is not even a suggestion from the defence side that the said FIR was not prepared at the said time. PW-1 Avtar Singh has given vivid details of the occurrence including full identity of the assailants in the FIR. He has also mentioned therein that his father PW-2 Harnam Singh was also with him then.

F No Court can afford to ignore the aforesaid strong circumstances while evaluating the evidence of PW-1 Avtar Singh and PW-2 Harnam Singh. They are greatly overriding factors *vis-a-vis* the omission on the part of Shri Tandon to identify any kith and kin of the deceased among the crowd.

G That apart, when PW-1 and PW-2 said that they too went to the sessions court along with Shamsheer Singh as the case was posted on that day the court must bear in mind that it is not an unusual practice in this

country for male members of the family of the accused to accompany him while going to the court to face trial in criminal cases. PW-1 and PW-2 said that they also went to the sessions court along with his son. This is a very probable version.

According to us, the High Court committed a serious error in using the omission of Shri Ram Prakash Tandon, the Field Officer (Police) in noticing the kith and kin of the deceased in the crowd for jettisoning the strong evidence of PW-1 and PW-2. The sessions court has rightly believed their testimony and the High Court should not have disturbed that finding.

Resultantly, we upset the order of acquittal and restore the conviction of the two accused of the offence under Section 302 IPC. But we do not think that there is any warrant for awarding death penalty to the accused. Ends of justice would be met by sentencing them each to imprisonment for life. Accordingly, we sentence each of the accused to imprisonment for life. We direct the sessions court to resort to such steps as are necessary to put the accused back in jail to undergo the sentence.

The appeal is disposed of accordingly.

P.T.

Appeal disposed of.