

STATE OF U.P.  
v.  
ASHOK DIXIT AND ANR.

FEBRUARY 16, 2000

[G.T. NANAVATI AND S.N. PHUKAN, JJ.]

*Indian Penal Code, 1860—Sections 302, 307—Arms Act—Section 25—Prosecution for offences—Material omissions—Eye witnesses not reliable—Acquittal, held, sustainable.*

The respondents-accused were convicted for offences u/s. 302 and 307 Indian Penal Code and Section 25 of the Arms Act by the Sessions Court but acquitted by the High Court. This appeal by the State was filed against the judgment and order of acquittal passed by the High Court.

The prosecution case was that on hearing sound of gun coming from the house of deceased, his brother, PW 1, proceeded to the house of deceased, along with his two sons where he met two police officers PW 7 and PW 15 and some persons of the locality; that they saw accused tumbling down the staircase where three accused were apprehended by the two police officers. Two deceased, husband and wife were found lying in a pool of blood in the house and PW 3 and PW 2, daughter and maternal uncle of deceased were found in injured condition. FIR was lodged by PW 1 on the basis of statement of injured witness M.

High Court acquitted the accused holding that the FIR could not be accepted as corroborating piece of evidence of the statement of PW 1 as injured M was not examined and PW 3 being a child witness was not held reliable. In this appeal against acquittal the question raised for determination was whether the High Court was justified in acquitting the accused respondents.

Dismissing the appeal, this Court

HELD : 1.1. There were material omissions which were fatal for the prosecution. PW 2 stated that accused A was related and regular visitor to the house of deceased but accused-C was not know to him earlier. There was no identification by PW 2 of accused A. There was no test identification

A parade regarding accused C and for the first time PW 2 identified him in the court but this identification cannot be accepted. [859-H; 860-A]

1.2. PW 3 was a child witness and at the time of occurrence she was aged nine and a half years old. Law is well settled that evidence of a child witness must be evaluated carefully as a child may be swayed by what others tell him and as an easy prey to tutoring. Wisdom requires that evidence of a child witness must find adequate corroboration before it is relied on. In the instant case, the occurrence took place on 8.8.82 but her statement u/s. 161 Cr.P.C. was recorded on 10.8.82 though after the occurrence she was residing with her uncle which was at a stone's throw from the house of deceased. The High Court was of the view that considering her age at the time of occurrence PW-3 might have been sleeping. This cannot be said to be impossible. PW-3 also had deposed that accused-A was known to her family and used to visit their house but accused C was not known to this witness. She identified both the accused in this Court. At the time of occurrence there was no electricity, therefore, it is difficult to accept that she being aged nine and a half years old could have identified accused C during the occurrence. From the evidence of PW-3, it was revealed that she came out from beneath a cot. This fact would support the contention that she might not have seen the occurrence. It will be risky to accept the evidence of PW3 for the purpose of identification as her evidence is uncorroborated. [860-B-G]

*Panchhi and Ors. v. State of U.P.*, [1998] 7 SCC 177, relied on.

1.3. Deceased, a doctor was allegedly, called by M and M was found in the injured condition in the up-stairs by PW 1 and PW 2 and was also taken to the hospital along with others. This material witness was not examined and no explanation had been given for his non-examination. This was fatal for the prosecution. [860-H]

1.4. No record had been produced to show that two police officers were near the place of occurrence. After arrest police officers did not go upstairs where four persons were lying injured. This behaviour of two police officers is contrary to the natural human conduct, therefore, it is difficult to believe their presence at the place of occurrence. [861-D-F]

1.5. Medical evidence did not support the evidence of the witnesses. According to the medical report of accused B, injuries on him were bleeding

but police did not find blood on the floor. According to the doctor, due to injuries caused to accused B, he might have suffered paralysis and he could not have moved 5-6 steps after falling down. However, according to prosecution witness accused B came down by their stair case to the ground floor fell down, got up and after going 5-6 steps, again fell down. [867-G-H]

1.6. PW 7 was examined as ballistic expert. According to him metallic Bullets recovered from the bodies of two deceased were not fired from pistols recovered from the possession of accused- respondents. Moreover, there were gun shot injuries on accused B. PW 2 and M were also injured. [862-B]

1.7. No explanation is forthcoming from the side of prosecution of the above discrepancies, therefore, it is held that the occurrence did not take place as alleged by prosecution. [862-C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 238-39 of 1989.

From the Judgment and Order dated 16.8.88 of the Allahabad High Court in CrI.A. No. 2742, 2743 and 2338 of 1988.

K.N. Nagpal, A.S. Pundir, Akhil Kaushik, Ms. Rachna Joshi and D. Bhandari for the Appellant.

A.D. Giri, (NP), K.T.S. Tulsi, Vijay Kumar, K.K. Mohan and B.S. Chauhan for the Respondents.

The Judgment of the Court was delivered by

PHUKAN, J. This appeal by the State is directed against the judgment and order dated 16.8.1988 passed by the High Court of Allahabad in Criminal Appeal Nos. 2742, 2743 and 2338 of 1984 arising out of Sessions Trial No. 202 of 1982. The Learned Additional Sessions Judge, Agra in the above Sessions Case convicted accused - respondents - Ashok Dixit and Chaman Lal under Sections 302 and 307 IPC and Section 25 of the Arms Act and sectioned them accordingly. Two separate appeals were filed before the High Court by the respondents-accused and one appeal by the State for enhancement of the sentence. The High Court dismissed the appeal filed by the State and allowed the appeals filed by the respondents-accused and acquitted them of their charges.

A On 8.8.1982, at about 9.00 p.m., on hearing sound of gun shot coming from the house of deceased - Dr. Dubey, his brother - Bhagat Dayal Dubey - P.W. 1, proceeded to the house of deceased Dr. Dubey, alongwith his two sons. In the house of the deceased, he met two police officers - Vijai Bahadur Singh - P.W. 7, Station House Officers of Police Station Civil

B Lines, District Etawah, Sub-Inspector of Police - Uma Shanker Yadav, Raj Narain Singh - P.W. 15 - Compounder of deceased Dr. Dubey, Shri S.K. Gupta - Advocate and one or two other persons of the locality. The house was dark as there was no electricity and two police officers took position behind the varendah of the house and P.W. 1 alongwith his two sons stood

C near the grill of the western varendah. They heard shots from the first floor of the house where deceased Dr. Dubey, his wife deceased Manorama Dubey, her daughter Kumari Ritu - P.W. 3 and Umesh Chand Mishra - P.W. 2 - maternal uncle of deceased Manorama Dubey were residing. At the time, they saw accused Brijendra Kumar tumbling down the staircase

D to the ground floor followed by present two accused - respondents Ashok and Chaman Lal, and three accused were apprehended by the two police officers, P.W. 7 and Sub-Inspector - Uma Shankar Dubey. Electricity was restored when the accused were apprehended. P.W. 1 with his two sons went upstairs and found deceased Dr. Dubey lying in a pool of blood near

E the dining table. Deceased Manorama Dubey was lying in a pool of blood on the dewan by the side of the wall of the drawing room and Munnu Singh was lying in the injured condition. PW-2 was also found in injured condition. They were taken to the hospital by PW-1 and one Pandey a tenant on the first floor where Dr. Dubey was residing. Dr. Dubey and his wife were

F found dead. P.W. 2 and Munnu Singh were medically examined and given treatment.

A pistol and four live cartridges were recovered from the possession of the accused Ashok and country made pistol and five live cartridges from the possession of accused Chaman Lal and a country made pistol and two

G cartridges were recovered from accused Brijendra Kumar. The two police officers did not go upstairs where the occurrence took place. They took the accused persons to the police station. Police after investigation submitted charge sheet. The FIR - Exh. 1 was lodged by P.W. 1 on the basis of statement of injured Munnu Singh but he was not examined, therefore,

H the High Court was of the opinion that the FIR cannot be accepted as

corroborating piece of evidence of the statement of P.W. 1. Accused A  
Brijendra Kumar died.

We have heard Shri K.N. Nagpal, learned counsel for the appellant  
and Shri K.T.S. Tuls, learned senior counsel for the accused - respondents.

Umesh Mishra - PW 2 uncle of the deceased - Manorama and Ritu B  
- PW 3 daughter of deceased - Dr. Dubey were the eye witnesses. PW 2  
used to live in the house of deceased - Dr. Dubey. According to PW 2  
while he along with deceased - Dr. Dubey, his wife deceased - Manorama  
and their daughter - Ritu PW 3 were sitting, Munnu Singh, compounder  
of Dr. Dubey called Dr. Dubey and he went out. They heard gun shots C  
stood up and after some time Dr. Dubey came and fell down near the  
dining table. Dr. Dubey was followed by three assailants. One assailant  
fired at deceased - Manorama. Accused - respondent Ashok fired at him  
and also at deceased - Manorama. He got panicky, went to the verandah  
and fell down and from there he heard the sound of firing. At that point D  
of time PW 1 and his two sons came up stairs and by that time electricity  
was restored. Both PW 1 and PW-2 went to the drawing room and they  
found Dr. Dubey lying on the floor of the dining room and Manorama on  
the dewan of the drawing room. Munnu Singh who was also injured came  
in side and fell down. PW 3 came out from beneath a cot from the bed  
room. E

PW 2 has stated that accused-respondent Ashok was known to him  
and Dr. Dubey and used to visit frequently the house of Dr. Dubey.  
Accused - Chaman Lal was not known to him earlier. PW 2, Dr. Dubey,  
Manorama and Munnu Singh were taken to the hospital by PW 1 with the  
help of one Pandey through the ground floor. The accused person after F  
being arrested were kept in the ground floor. PW 2 did not mention in his  
statement under Section 161 Cr.P.C. that accused - Ashok came along with  
other two accused to the first floor and fired at him and Manorama and  
also the fact that accused-Ashok and other two accused were in the ground  
floor. G

These are material omissions. Therefore, we are of the opinion that  
these omissions are fatal for the prosecution. More, particularly, when  
accused-Ashok was related and regular visitor to the house of Dr. Dubey.  
We, therefore, hold that there was no identification by PW 2 of accused-  
Ashok. Regarding accused-Chaman Lal after the occurrence there was no H

A test identification parade and for the first time PW 2 identified the accused-Chaman Lal in the court. This identification cannot be accepted.

B PW 3 was a child witness and at the time of occurrence she was aged 9-1/2 years old. Occurrence took place on 8.8.82 but her statement under Section 161 Cr.P.C. was recorded on 10.8.82 though after the occurrence she was residing with her uncle which was at a stone's throw from the house of Dr. Dubey.

C Law is well settled that evidence of a child witness must be evaluated carefully as a child be swayed by what others tell him and as an easy prey to tutoring. Wisdom requires that evidence of a child witness must find adequate corroboration before it is relied on. (see : *Panchhi and Ors. v. State of U.P.*, [1998] 7 SCC 177.

D The High Court was of the view that considering her age at time of occurrence PW 3 might have been sleeping. This cannot be said to be impossible.

E PW 3 also has deposed that accused-Ashok was known to her family and used to visit their house but accused - Chaman Lal was not known to this witness. She identified with the accused in the court. At a time of occurrence there was no electricity, therefore, it is difficult to accept that she being aged 9-1/2 years old could have identified accused-Chaman Lal during the occurrence. From the evidence of PW 1 and PW 2 we find that when they went to the bed room, PW 3 came out from beneath a cot. This fact would support the contention that she might not have seen the occurrence.

G We have already discarded the evidence of PW 2 on the point of identification of the accused, therefore, it will be risky to accept the evidence of PW 3 for the purpose of identification as her evidence is uncorroborated.

H Dr. Dubey was called by Munnu Singh. He was found in the injured condition in the up stairs by PW 1 and PW 2 and was also taken to the hospital along with others. This material witness was not examined and no explanation has been given for his non-examination. This in our opinion is fatal for the prosecution.

According to Mr. Vijay Bahadur Singh - PW 7, Station House Officer of Civil Lines, Police Station, he along with sub-Inspector Uma Shanker Yadav was on patrolling duty and when they were checking the out posts of Civil Lines, Police Station, they heard sound of gun fire coming from the house of Dr. Dubey at about 9.00 pm. and he along with sub-Inspector, Yadav proceeded on the motorcycle to the house of Dr. Dubey where they met Satyendra Gupta, Advocate and Raj Narain Singh - PW 15. They also saw PW 1 and his two sons. There was no electricity at that time and these two police officers did not go inside the house but took position outside the house. They heard the sound of gun fire coming from the first floor of the house where deceased-Dr. Dubey was residing. Thereafter, they saw accused - Brijendra tumbling down the stair-case to the ground floor followed by other two accused who were apprehended and arrested by them. They recovered pistols and cartridges as stated above from them.

No record has been produced to show that these two police officers were near the place of occurrence at the outpost of Civil Lines, Police Station on patrol and Checking duty. This outpost is at the distance of 100-125 yards from the place of occurrence. After arrest police officers did not go up stairs where four persons were lying injured and according to PW 15 he wanted to go up stairs but he was summoned by these police officers. These police officers saw PW 1 and his two sons going up stairs. PW 1 with the help of Pandey took deceased - Dr. Dubey, his wife - deceased Manorama and injured Munnu Singh and PW 2 through the ground floor to the hospital. If police officers were present at that time on the ground floor their immediate reaction would have been to make proper inquiries, go up stairs and see the place of occurrence but they did not do so. This behavior of these two police officers is contrary to the natural human conduct and it is difficult to believe their presence at the place of occurrence as deposed by PW 7.

Exhibit Ka 6 is the medical report of accused-Brijendra Kumar. Injury Nos. 2 and 3 were caused as a result of gun shots. All these injuries were bleeding but police did not find blood on the ground floor or on the stair case. According to Dr. R.K. Choudhary - PW 5 due to the injuries caused to accused-Brijendra, he might have suffered paralysis and he could not have moved 5-6 steps after falling down. According to prosecution witnesses accused-Brijendra came down by stair case to the ground floor

A fell down, got up and after going 5-6 steps fell down. Therefore, medical evidence does not support the evidence of the witnesses.

B Ramashram Pandey - PW 17 was examined as ballistic expert. According to him metallic bullets-Exhibit EB-1 recovered from the body of Dr. Dubey and Exhibit EB-2 recovered from the body of deceased - Manorama were not fired from the pistols recovered from the possession of accused-respondents and Brijendra Kumar. Moreover, there were gun shot injuries on accused Brijendra Kumar, PW 2 and Munnu Singh were also injured.

C No explanation is forthcoming from the side of prosecution for the above discrepancies, therefore, we hold that the occurrence did not take place as alleged by the prosecution. We further hold that the High Court has rightly acquitted the accused- respondents.

D In result, the present appeal has no merits and accordingly it is dismissed.

R.A.

Appeal dismissed.