

A

STATE OF U.P.  
v.  
MUSHTAQ ALAM

JULY 25, 2007

B

[DR. ARIJIT PASAYAT AND P.P. NAOLEKAR, JJ.]

C

*Penal Code, 1860—s. 302—Murder—Prosecution for—Conviction by trial court in view of evidence of one eye-witness and two other witnesses—Acquittal by High Court disbelieving the evidence of the witnesses and finding the oral evidence contrary to medical evidence—On appeal, held: Accused rightly acquitted—Reasoning indicated by High Court disbelieving prosecution version does not suffer from infirmity.*

D

*Evidence—Oral evidence vis-à-vis medical evidence—Evidentiary value—Held: Though oral testimony has to get preference over medical evidence yet, when Medical evidence totally improbablises an oral testimony, it is a relevant factor.*

E

Appellant-accused was charged for having caused death of one person. It was alleged that accused fired at the deceased while he was going with PW-1. On hearing the cries of PW-1 and the deceased, PW-4 and thereafter PW-7 reached the spot. Deceased was taken to hospital. A case u/s 307 IPC was registered. After the report of death of the deceased, the same was converted to one u/s 302 IPC. During trial PW-1 was examined as eye-witness and he claimed to have seen the accused. Trial Court finding the evidence of PWs 1, 4 and 7 as credible and cogent, convicted the accused. High Court held that the evidence of PWs 1, 4 and 7 did not inspire confidence; and that prosecution version was rendered untruthful in view of the medical evidence. Thus the accused was acquitted. Hence the present appeal.

F

G

Dismissing the appeal, the Court

HELD: 1. The reasoning indicated by the High Court to discard the prosecution version, does not suffer from any infirmity to warrant interference. [Para 14] [530-G]

H

2. The High Court has taken note of several factors to find the

prosecution version improbable. PW-1 stated that he and the deceased had gone to take tea after dinner. In the post mortem report it was found that there was no presence of food in the stomach except 20 grams of watery fluid and even the small intestines were empty. According to PW-1 the Police Constable (PW-7) arrived at the spot immediately and he had taken the deceased to the hospital. Both PWs. 1 and 4 admitted that the names of the assailants were not disclosed by PW-1 to PW-7. Only name of the deceased was told. The High Court found it improbable that when the Police Constable had arrived at the spot why the name of the assailant could not have been told. Further, PW-1 had accepted that he had not accompanied the deceased to the hospital and waited at the spot for about 40 minutes before he left for the police station to lodge the first information report. This, according to the High Court, was also un-natural conduct. In a normal course, he could have either accompanied the deceased or could have immediately gone to the police station which was not very far away from the place of occurrence to lodge the FIR.

[Para 12] [529-H; 530-A-C]

3. The presence of PWs. 1 and 4 at the spot has also been found to be not established. PW-4 is the owner of a tea stall. The High Court found that he had no reason to go out in the night to take tea at another tea stall which was at a distance from his own house. The evidence of PW-1 so far as manner of assault and about his presence has been stated to be not consistent. In the examination-in-chief he stated that both he and the deceased were coming together when the accused put the pistol on the side of the deceased and shot. On being shot at, both PW-1 and the deceased cried loudly but in the cross examination he categorically admitted that he was at a distance and was coming behind the deceased as he had stopped mid way to urinate. That is why he was not by the side of the deceased. The High Court referred to this aspect to conclude that possibility of his having seen the assailant was remote.

[Para 12] [530-E-F]

4. So far as the gun shot injury is concerned, the prosecution version was contrary to what PW-1 deposed. Though oral testimony has to get preference over the medical opinion, yet when the latter totally improbabilises a witness's oral testimony, same is a relevant factor. [Para 13] [530-D]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 284 of 2001.

From the Judgment & Order dated 30.11.1999 of the High Court of

**A** Judicature at Allahabad in Criminal Appeal No. 1140 of 1980.

M. Yunus Malik and Javed Mahmud Rao for the Appellant.

B.S. Jain and Dr. Vipin Gupta for the Respondent.

**B** The Judgment of the Court was delivered by

**DR. ARIJIT PASAYAT, J. 1.** The order of acquittal passed by a Division Bench of the Allahabad High Court is the subject matter of challenge in this appeal. Before the High Court the respondent had challenged the correctness of the judgment and order dated 24.5.1980 passed by the then IX Additional Sessions Judge, Kanpur, convicting him for an offence punishable under Section 302 of the Indian Penal Code, 1860 (in short the 'IPC') and sentencing him for imprisonment for life.

2. Prosecution version in a nutshell is as follows:

**D** 3. The deceased in this case was Mohammed Anwar. He was in love with the younger sister of the accused Mushtaq Alam and both of them wanted to marry each other, which move was being opposed by the accused and his family members. On this issue the accused even harassed and used to beat her sister, consequently she committed suicide. Accused Mushtaq Alam became inimical to the deceased as he thought that it was on account of him that his sister ended her life.

**E** 4. On 18.8.1979 at about 11.00 p.m. the deceased was coming back home from Halim College crossing alongwith Shakir (PW-1). When they were in front of Jay Bharat Washing Company, accused-appellant appeared there with a country made pistol in his hand and fired a single shot on the back of the deceased, who on being hit, fell down on the ground. The incident was witnessed by Shakir (P.W.1) in the electric light emanating from the neighbouring houses. The cries of the deceased and Shakir (P.W.1) attracted to the scene of occurrence Ghulam Mustafa (PW-4) and Mohammed Jamil, who saw the accused running away from the scene of occurrence. Similarly, **F** constable Amar Singh (PW 7) also reached the spot on hearing shouts for help.

**G** 5. Shakir (P.W.1) got the First Information Report (Ex.Ka.1) scribed by Mohammed Hasan and lodged the same on that night at 11.40 P.M. at police station Raipurwa. Head constable Deena Nath (P.W. 2) prepared check report

**H**

and registered the case under Section 307 I.P.C. After receiving information of the death of Mohammed Anwar the case was converted to under Section 302 I.P.C. Sub-Inspector Ramyagya Singh (P.W.6) was the Investigating Officer who rushed to the spot after registration of the case but did nothing in the night and collected blood from the scene of occurrence in the morning of 19.8.1979. He also made an inspection of the scene of incident and prepared site plan (Exb.Ka.12). The witnesses were also interrogated. On transfer of Inspector Ramyagya Singh, Sub-Inspector O.P. Mishra (P.W.8) took up the investigation and he submitted charge sheet against the accused.

6. After the completion of investigation, charge sheet was placed and in view of the denial of the accusations trial was held. At the trial, 8 witnesses were examined. PW-1 claimed to be an eye-witness and PW-4 claimed to have arrived at the spot immediately after the occurrence. The trial court found the evidence of PWs 1, 4 and 7 to be credible and cogent and, therefore, recorded conviction and imposed sentence as noted above.

7. Before the High Court the stand of the accused was that the evidence of PWs 1, 4 and 7 does not inspire confidence and the presence of the so-called eye-witness and that of PW-4, PW 7 appear to be totally without any truth and the prosecution version is rendered unacceptable in view of the medical evidence.

8. The State's stand, on the other, hand is that the evidence has been analysed in great detail by the trial Court and, therefore, the High Court should not have accepted the stand of the accused.

9. The High Court, as noted above, directed acquittal doubting credibility of prosecution version.

10. In support of the appeal, learned counsel for the appellant submitted that the High Court should not have discarded the evidence of PWs 1, 4 and 7. There is no infirmity in their evidence to warrant interference.

11. Learned counsel for the accused-respondent on the other hand supported the judgment of acquittal passed by the High Court.

12. The High Court has taken note of several factors to find the prosecution version improbable. PW-1 stated that he and the deceased had gone to take tea after dinner. In the post mortem report it was found that there was no presence of food in the stomach except 20 grams of watery fluid and

A even the small intestines were empty. According to PW-1 the Police Constable (PW-7) arrived at the spot immediately and he had taken the deceased to the hospital. Both PWs. 1 and 4 admitted that the names of the assailants were not disclosed by PW-1 to PW-7. Only name of the deceased was told. The High Court found it improbable that when the Police Constable had arrived at the spot why the name of the assailant could not have been told. Further, B PW-1 had accepted that he had not accompanied the deceased to the hospital and waited at the spot for about 40 minutes before he left for the police station to lodge the first information report. This, according to the High Court, was also un-natural conduct. In a normal course, he could have either accompanied the deceased or could have immediately gone to the police station which was not very far away from the place of occurrence to lodge C the FIR.

13. So far as the gun shot injury is concerned, the prosecution version was contrary to what PW-1 deposed. Though oral testimony has to get preference over the medical opinion, yet when the latter totally improbabilises D a witness's oral testimony, same is a relevant factor.

14. The presence of PWs. 1 and 4 at the spot has also been found to be not established. PW-4 is the owner of a tea stall. The High Court found that he had no reason to go out in the night to take tea at another tea stall which was at a distance from his own house. The evidence of PW-1 so far E as manner of assault and about his presence has been stated to be not consistent. In the examination-in-chief he stated that both he and the deceased were coming together when the accused put the pistol on the side of the deceased and shot. On being shot at, both PW-1 and the deceased cried loudly but in the cross examination he categorically admitted that he was at F a distance and was coming behind the deceased as he had stopped mid way for urinate. That is why he was not by the side of the deceased. The High Court referred to this aspect to conclude that possibility of his having seen the assailant was remote. The reasoning indicated by the High Court to discard the prosecution version, as analysed above, does not suffer from any infirmity to warrant interference.

G 15. The appeal fails and is dismissed.

K.K.T.

Appeal dismissed.