
(1992) 08 MP CK 0028

In the Madhya Pradesh High Court

Case No : Criminal Appeal No. 451 of 1991

Akram and Others

APPELLANT

Vs

State of M.P.

RESPONDENT

Date of Decision : 10-08-1992

Acts Referred:

Evidence Act, 1872 — Section 27

Penal Code, 1860 (IPC) — Section 148, 149, 302, 307

Citation : (1993) CriLJ 1630

Hon'ble Judges : V.D. Gyani, J;A.R. Tiwari, J

Bench : Division Bench

Advocate : J.P. Gupta and P.K. Gupta, for the Appellant; Chouhan, Dy. Govt. Advocate, for the Respondent

Final Decision : Allowed

Judgement

A.R. Tiwari, J.—In this appeal, the judgment passed by IInd Addl. Sessions Judge, Dewas in Sessions Trial No. 65/86 on 24-9-1991 thereby convicting the appellants for offences punishable under Sections 148, 302/149 and 307/149 of the Penal Code and sentencing each of them to suffer imprisonment for life and fine of Rs. 1,000/- and in default, Rigorous Imprisonment for six months u/s 302/149 of the Indian Penal Code, Rigorous Imprisonment for five years and fine of Rs. 250/- and in default, Rigorous Imprisonment for one month u/s 307/149 of the Penal Code and fine of Rs. 250/- and in default, Rigorous Imprisonment for one month u/s 148 of the Penal Code with a direction that a sum of Rs. 4,000/- shall be paid each as compensation to Raiyasa, widow of Basheerkhan and to Niyazan, widow of Bubukhan out of the fine so imposed, has been assailed.

2. Factual matrix lies in a narrow compass. The fields of the complainant party and the accused party are adjacent to each other, MEND (boundary) divides these fields. On 26-7-85, accused persons threw away the stones fixed on the field of the deceased Babu Khan, Babu Khan and his son Basheer Khan, resident

of village Luhari, came to Dewas for lodging the report. At about 6.00 p.m., these along with another son Ishaq, were returning to their home. At that time, one girl Bibee rushed to the house of Manjeet Khan to inform that these three were beating one Munnar Khan who is alone. On this, threat was given and the accused attacked on Babu Khan, who died on the spot and on Basheer Khan, who later succumbed to the injuries in hospital and on Ishaq Khan who was injured. One Raies informed the police which proceeded to the spot. Shama alias Bhuribai (PW-1) made the report which was recorded as Dehati Nalish (Ex.P/1). The postmortem was performed by Dr R. C. Mundra (PW-4) and Dr. R. C. Sharma (PW-5) whose reports are respectively Exs.P/2 and P3. Pursuant to disclosures u/s 27 of the Evidence Act, weapons were recovered and seized. The report from Chemical Examiner was obtained. Injury report of Basheer is Ex.P/21. Injury report of Ishaq is Ex.P/23. The accused Akram also sustained injuries. Injury report Ex.P/25. After investigation, challan against 17 persons was filed before the Chief Judicial Magistrate Dewas and against one minor Gani before the Juvenile Court for Trial. Charges under Sections 148, 302 and in the alternative u/s 302/149 of the Penal Code (as regards Babukhan) and 302 and in the alternative u/s 302/149 of the Penal Code (as regards Basheer) and 307 and in the alternative u/s 307/149 of the Penal Code (as regards Ishaq) were framed to which all the accused persons pleaded not guilty. On trial, the Court acquitted 11 accused persons of all the charges and convicted remaining six accused persons, who are appellants here, for the offences punishable under Sections 148, 302/149 and 307/149 of the Indian Penal Code and sentenced as noted above.

3. We have heard Shri J. P. Gupta, Senior Counsel for the appellants as also Shri G. S. Chauhan, learned Dy. Government Advocate for the State and have also perused the record.

4. Shri Gupta has vigorously impugned the judgment, on the following grounds:--

(a) The appellant Akram, aged 20 years, sustained injuries on his person as proved by Ex.P/25, in the same incident which were not explained and hence, genesis has been suppressed.

(b) The conviction is based only on the sole and interested testimony of PW-22 Ishaq who has been disbelieved at least with regard to 11 persons, since acquitted by the trial Court, and as such the conviction has been wrongly recorded.

(c) The trial Court has erred in so-called separation of grain from the chaff.

5. On the other hand, Shri Chauhan, strenuously supported the judgment and univocally urged that the trial Court rightly and reinvigorately separated the grain from the chaff and that the conviction was well-merited.

6. It may be mentioned right at the threshold that (PW 7) Hussain Khan, PW 8 Kamruddin, PW 13 Sewaram, have turned hostile. Seizure of weapons and disclosures have not been held as proved (para 4 of the judgment). Niyazan (PW

25), Raiysa (PW 3) and Shama alias Bhuribai (PW-a) have not been found to be eye-witnesses to the alleged incident. (Para 55 of the Judgment). PW 15 Kaloo too admitted (para 1 of his statement) that he had neither seen the incident nor the accused persons. The case thus, primarily hinges on the sole testimony of PW 2 Ishaq (Para 60 of the judgment). And he too is not found to be wholly reliable (para 69 of the judgment). The statement (Ex. D/2) of PW 2 Ishaq, recorded as Dying Declaration, was liable to be excluded from consideration since he had survived.

7. Before evaluating evidence of this solitary witness, it is pertinent to reproduce the finding of the Trial Court itself as recorded in para 69 of the impugned judgment:

^^leLr ifjflFkfr;ksa dks n`f"Vxr j[krs gq;s esjk ,slk er gS fd vkjksih ethr] jQhd] vthr] Hks:] vdje] llnkj bu N% vkjksfi;ksa dks NksM+dj "ks"k vkjksihx.k ds uke tks lk{kh bZ"kkd bl gR;k] naxs ,oa gR;k ds iz;kl es crk jgk gS] og laHkor% mUgsa feF;k iw.kZ :i ls Q?lkus ds fy;s crk jgk gS A ;g Hkh laHko gS fd og lEiw.kZ ifjokj dks blesa Q?lkuk pkgrk gS] blfy;s muds uke crk jgk gS A**

What clearly emerges from this is that the sole witness has been held to be partly unreliable. It cannot be disputed that the conviction can be based even on the evidence of a single witness provided it is found to be wholly reliable. If it is not so found, then corroboration is essential. In Mathura v. State 1982 WN 396 it is held that :--

The witnesses, therefore, have not been treated as wholly reliable even by the Trial Court. For this reason some other evidence to provide at least some corroboration to the version of Budhman (PW 2) for convicting the appellant even for the third murder of Patiraj must be found in order to sustain his conviction. There is no such corroboration available in the prosecution evidence.

xx xx xx There is no such corroboration from independent source. We are thus, obliged to lift the lambrequin.

8. On scrutiny, we find that PW 2 Ishaq has made omnibus allegations against all the accused persons. (Para 4). He is unable to particularise about assailants and weapons of assault. He is also not in position to say as to who caused the injuries as alleged (Para 11). Names of at least two present appellants (Majid and Bheru) are not disclosed even in his earlier statement before the police (Ex. D/2). The suggestion that the aforesaid three persons (deceased and the injured) attacked Akram, the appellant, was denied. It was also denied that these three were the real aggressors and the accused party acted in defence. On this kind of evidence, it was neither possible nor permissible to indulge in exercise of sifting the so-called grain from the chaff. There does not appear to be any rational basis to convict six and acquit 11 accused. This exercise, inclemently impermissible on facts, is clearly in futility.

9. In Lakshmi Singh and Others Vs. State of Bihar, It is laid down as to what

inferences in the event of non-explanation of injuries sustained by accused can and should be drawn. It is observed that (para 11)--

It seems to us that in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of alternation is a very important circumstance from which the Court can draw the following interences:

(1) That the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version.

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore, their evidence is unreliable:

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

The omission on the part of the prosecution to explain the injuries on the person of the accused, assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one. In the instant case when it is held, as it must be that the appellant Dashrath Singh received serious injuries which have not been explained by the prosecution, then it will be difficult for the Court to rely on the evidence of PWs-1 to 4 and 6, more particularly, when some of these witnesses have lied by stating that they did not see any injuries on the person of the accused. Thus, neither the Sessions Judge nor the High Court appears to have given due consideration to this important lacuna or infirmity appearing in the prosecution case. We must hasten to add that as held by this Court, in *State of Gujarat Vs. Bai Fatima and Another*, there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. The present, however, is certainly not such a case and the High Court was, therefore, in error in brushing aside this serious infirmity in the prosecution case on unconvincing premises.

10. The prosecution has thus, suppressed the genesis and the origin of the incident and has thus, not presented the true version, The defence version is rendered probable so as to throw doubt on the entire warp and woof of the prosecution case. The injuries found on the person of the appellant Akram, as noted in Ex. P./25, cannot be categorised as minor or superficial. The evidence led by the prosecution is thus neither clear nor cogent. It is not independent and disinterested. It is not consistent and creditworthy. Once it is found that PW 2 Ishaq tried to implicate even the innocent persons then not even a single person

can be convicted on the statement of such a witness. It is held in the aforesaid decision (supra) as under (para 16 of Lakshmi Singh and Others Vs. State of Bihar,

Where all the witnesses enter into a conspiracy to implicate five innocent persons in a murder case, then the backbone of the prosecution is broken, and it would be difficult for the Court to rely on such evidence to convict a single accused, particularly when the prosecution does not give any explanation for the grievous and other serious injuries on the person of one of the accused. It is a case where it is not possible to disengage the truth from falsehood, to sift the grain from the chaff. The truth and falsehood are so inextricably mixed together that it is difficult to separate them. Indeed if one tries to do so, it will amount to reconstructing a new case for the prosecution which cannot be done in a criminal case.

XX XX XX 11. Admittedly it is a case resting on the evidence of sole testimony of PW 2 Ishaq and this witness is not found to be fully reliable by the trial Judge. In Vadivelu Thevar Vs. The State of Madras, it is held that where the case rests on the testimony of the sole eye-witness, such witness must be found wholly reliable. The aforesaid judgment is followed by this Court in Mangilal v. State of M. P., 1990 Cri LR (SC) 311. The story as put forward thus fails to inspire confidence.

12. Applying the test as enunciated above, we hold that PW 2 cannot be believed even for convicting the appellants. In Puttan alias Kamal Prasad Vs. State of U.P., it is held that (para 5) :-

Even otherwise Hari Om and Badshah Singh having been acquitted on the same evidence, there is no justification to sustain the appellants' conviction.

In our view, this ruling fully applies to the case on hand. The evidence does not unerringly point to the guilt of the appellants. The appellants seem to have been entangled in a quagmire. Verdict palpably demonstrates the protervity.

13. We thus, hold that the Trial Court has committed serious error in recording conviction of the appellants. Strangely enough, the trial Judge has stated that it has been done on separation of the grain from the chaff without appreciating that, in the face of the statement of PW 2 Ishaq referred to above, it was not possible to disengage the truth from falsehood because both are inextricably mixed together. The Trial Judge, in so doing without justification, has reconstructed almost a new case unwarranted in law.

14. It is a case of double murder and an attempt to murder the third one, Father and his two sons. Heart-rending it is but criminal justice concerns itself only with legal and definite proof and emotions are not permitted to reside in its wardrobe. And the prosecution is under obvious obligation to tell as to how the tale originated. Dr. J. R. Patel (PW 11) had also examined the appellant and found the four injuries on his person as per his report (Ex. P/25) The Injury No. 4 was

grievous in nature. It was amputated (Rt.) hand thumb, by the level of 1st inter phalangeal joint. The question of non-explanation was material and significant, but it has been brushed out on wrong premise (paras 75 and 76 of the Judgment) witnesses did lie on this material point. The names of six appellants were not liable to be picked up from Ex. D/2, alleged dying-declaration of PW 2 Ishaq, recorded by Ramesh Chandra (PW 16), Naib Tahsildar on 27-7-85 at 1.10 A.M. Firstly it had to be excluded from consideration. Secondly, it is without proper assurance of its being truthful and spontaneous. Thirdly, it without dependable corroboration. Fourthly, it is by a person who is not an independent witness and has a hostile animus and is not found to be wholly reliable. Sixthly, It is denied even by PW 2 himself as he stated that he did not give any statement like Ex. D/2 (para 12 of statement). Seventhly, it does not speak of injuries on appellant Akram as proved. In the face of this kind of evidence on which the conviction is founded, we find it unnecessary to examine any other aspect like right of private defence etc. when "genesis" is suppressed and "separation" of grain is not possible. Altogether a new case has been constructed and it appears that the Trial Court was swayed by in the face of loss of two precious lives and injuries to the third one. It is worthwhile to recall observation of the Apex Court in Datar Singh Vs. The State of Punjab, articulating that:--

Courts of Justice cannot be swayed away by sentiment or prejudice against a person accused of the very reprehensible crime.

15. Conviction, which to us appears to be a moral conviction, admittedly based upon the sole testimony of PW 2 Ishaq who is held to be partly unreliable by the Trial Court is thus liable to be vacated. We may quote the observation, made by their Lordships of the Supreme Court in Sharad Birdhichand Sarda Vs. State of Maharashtra, reading as follows :--

A moral conviction, however strong or genuine, cannot amount to legal conviction supportable in law.... It must be realised that the well established rule of criminal justice is that "Fouler the crime, higher the proof".

16. Akram"s injuries remain unexplained. "Ex. P/1 loses meaning when its maker itself has been disbelieved. There is no legal proof of formation of unlawful assembly either. There is no indication of individual acts. The case falls, as it ought to, in its entirety. "Petitio principii" stays unresolved.

17. In this state of affairs, we are, on evaluation of evidence, not inclined to accept the testimony of PW 2 Ishaq, an interested and partly discredited witness, and are in disagreement with the findings of the Court below. There is no other dependable material to connect the appellants with the alleged crime. Consequently, we set aside the conviction and sentence as recorded by the Trial Court.

18. In the result, this appeal is allowed and the appellants are directed to be set at liberty forthwith unless their detention is required for some other case. The fine, if realised, shall be refunded.

19. Before parting with this appeal, we must observe that the Trial Court had passed only single sentence u/s 302/149 of the Indian Penal Code though charged on double count i.e. for murder of Babu Khan and Basheer despite verdict of guilt having been recorded on both these counts. This is clearly a legal error which, however, has now lost the significance in view of the reversal of the impugned judgment.