
(2010) 01 MP CK 0040
In the Madhya Pradesh High Court

Balkishan (deleted), Sultan Singh, Gabbar Singh and Babulal @ Babu Singh APPELLANT

Vs

State of M.P. RESPONDENT

Date of Decision : 19-01-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 157
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2011) 6 RCR(Criminal) 1475

Hon'ble Judges : Indrani Datta, J;A.K.Shrivastava, J

Bench : Division Bench

Judgement

Indrani Datta, J.—This appeal has been preferred by the appellants assailing the judgment of conviction and sentence dated 20.11.1997 passed by learned IV Additional Sessions Judge, Gwalior in S.T. No. 186/1985; whereby, appellants Sultan Singh and Babulal have been convicted u/s 302 of IPC and appellant Gabbar Singh has been convicted u/s 302/34 of IPC and sentenced to suffer life imprisonment and to pay fine of Rs. 2000/-each with default stipulations.

2. Indisputably, the accused / appellant Balkishan has died during pendency of appeal. Vide order dated 12.4.06 his name has been deleted from the array of appellants hence the appeal so far as appellant Balkishan is concerned, stands abated.

3. Facts in a nutshell giving rise to the appeal are that on 17.09.1985 at about 5 p.m. in the evening complainant Sukha was returning from his field after grazing his cattle. Deceased Tejsingh was also going towards his village with his cattle. Balkishan (deceased accused) and appellant Sultan Singh were sitting on the mound of field of Jagdish Pujari and they were armed with Kharerua and Luhangi. Appellants Gabbar Singh and Babulal were also present there and Babulal was armed with lathi. As soon as deceased Tejsingh reached there, appellant Gabbar Singh caught hold of him and thereafter Balkishan (deceased accused) and other appellant Sultan Singh and Babulal inflicted blows on the

head of deceased by means of Kharerua, Luhangi and lathi. Complainant Sukha tried to rescue deceased Tejsingh, then all the appellants tried to assault him also, so he ran away from the spot. Incidence has been witnessed by Lakharam (PW-4), who was also present on spot. Complainant Sukha (PW-3) informed the inhabitants of village namely Hukumsingh and Ramsingh and other persons, who reached on spot and found that deceased Tejsingh had already expired. Thereafter, Sukha lodged a report in the Police Station Madhavganj at 3.00 a.m. On the basis of report Ex.P/6, the matter was investigated. Spot map was prepared vide Ex.P/1. Dead body of deceased was sent for postmortem vide Ex.P/13. Postmortem was conducted vide Ex.P/14. Weapons used in the incidence were sized vide Ex.P/9 to P/12 and after investigation, charge-sheet was filed in the court of JMFC Gwalior, from where the case was committed to the court of Sessions.

4. The appellants were charged, prosecuted and tried for committing offence u/s 302/34 of IPC. Appellants abjured their guilt and pleaded false implication. After conclusion of trial, learned IV ASJ Gwalior convicted and sentenced the appellants as stated above. Hence this appeal.

5. Many fold submissions have been made by the learned Counsel for the appellants.

6. Learned Counsel for State on the other hand supported the judgment and prayed for dismissal of appeal.

7. Heard the learned Counsel for the parties at length and perused the record.

8. To prove its case, the prosecution has examined as many as 9 witnesses out of which PW-3 Sukha and PW-4 Lakharam are eye-witnesses. In defence appellants examined three witnesses.

9. The contention of learned Counsel for the appellants is that as per the prosecution case alleged eye-witnesses are Sukkha (PW-3) and Lakharam (PW-4) out of which Sukkha nephew and Lakharam is near relative of deceased Tejsingh and therefore their statements are not reliable as they are chance and interested witnesses.

10. So far as first contention of learned Counsel for appellants is concerned, this contention is not acceptable. In the present case, main evidence is ocular evidence of PW-3 Sukha and PW-4 Lakharam. PW-3 Sukha has narrated that on the date of incidence at about 5 p.m. when he was returning to his home after grazing his cattle, Tejsingh was going ahead towards village and near Jagdish Pujari Charu Ki Dinger, all the appellants were sitting. Appellant Sultan Singh was armed with Luhangi and Babulal was armed with Lathi and Balkishan was armed with Kharerua, as soon as deceased Tejsingh reached there, appellant Gabbar Singh caught hold of him and thereafter Balkishan (deceased accused) inflicted blow by Kharerua on the head of deceased. Appellant Sultan Singh inflicted Luhangi blow and appellant Babulal inflicted lathi blow on the head of deceased

Tejsingh, and when he tried to rescue deceased Tejsingh, appellants tried to catch him and then he ran away from the spot and narrated the incidence to Hotam Singh, Ramsingh. He reached again on spot with them and found that Tejsingh has died. He intimated about the incidence to the son of deceased Tejsingh, who was not in the village at that time and had gone to Lashkar then he lodged report at 3.00 a.m. at Police Station as per Ex.P/6 and thereafter police prepared spot map as per Ex.P/7. In paragraph 11 this witness has admitted that deceased was his real uncle.

11. Statement of this eyewitness PW-3 Sukha has been corroborated by the statement of PW-4 Lakharam who was also present at the place of occurrence and has specifically stated that Gabbar Singh caught hold deceased Tejsingh and all other appellants inflicted injuries by means of their weapons on the head of deceased by their respective weapons. He further deposed that at that time Sukha was also present there and though Sukha tried to rescue deceased Tejsingh but when appellants / accused tried to catch him, he ran away from the spot.

12. On appreciation of evidence of these eye-witnesses, we find that their testimony is wholly reliable. Undisputedly PW-3 Sukha is related witness however on the basis of it, his testimony cannot be jettisoned but his testimony has to be scrutinized with care and caution. The Hon"ble Apex Court in the case of *Namdeo v. State of Maharashtra* 2007 AIR SCW 1835 has held that a witness who is a relative of the deceased or victim of a crime cannot be characterised as "interested". The term "interested" postulates that the witness has some direct or indirect "interest" in having the accused somehow or other convicted due to animus or for some other oblique motive. It is further held that evidence of relative witness, however, must be scrutinized carefully. If on such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the "sole" testimony of such witness. Close relationship of witness with the deceased or victim is no ground to reject his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one.

13. So far as relationship of the eyewitness with the deceased is concerned, the relationship does not affect credibility of a witness as observed by the Apex Court in the case of *S. Sudershan Reddy and Ors. v. State of A.P.* (2006) 3 SCC (Cri.) 503. In this case it is held that relationship is not a factor to affect the credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse the evidence to find out whether it is cogent and credible. Similar view is expressed in case of *State of A.P. v. S. Rayappa and Ors.* (2006) 2 SCC (Cri.) 353 that merely because witness were related to deceased, they cannot be said to be interested witnesses and on that ground alone, their testimony cannot be rejected. In view of the reluctance of

the general public to be a witness, a close relative is the only natural witness, and the only requirement is that testimony of such a witness should be examined cautiously by court.

14. That apart, it is admitted fact that PW-4 Lakharam is not in close relation with deceased, hence there is no reason to disbelieve his testimony. Evidence of eye-witnesses PW-3 Sukha and PW-4 Lakharam are corroborated with each other so also with the version of FIR. Therefore, there is no reason to disbelieve the ocular testimony of these two eyewitnesses.

15. So far as contention of learned Counsel for the appellants that PW-3 Sukha and PW-4 Lakharam are chance witnesses hence their statements are not reliable is concerned, this argument does not find worth in the facts and circumstances of the case. In the case of *Lilli @ Surendra Pandey and another v. State* ILR (2007) M.P. 1698 it is held that testimony of witnesses cannot be discredited merely because he is a chance witness.

16. Next contention of learned Counsel for appellants is that the prosecution has failed to examine the independent witness, who were present on the spot at the time of occurrence as admitted by PW-8 Investigating Officer Chhotelal Sharma in cross-examination paragraph 12 wherein he has stated that Hotam Singh and Bhura were present on spot at the time of occurrence. It is further contended by learned Counsel for appellants that Bhura and Hotam Singh have been examined as DW-2 and DW-3 and their statements falsify the prosecution story. Relying upon the statement of DW-1 Raghuwar, DW-2 Bhura and DW-3 Hotam Singh it is argued that DW-1 Raghuwar narrated that he saw deceased on the spot at about 8 p.m. then he went to deceased house and then called PW-3 Sukha and PW-4 Lakharam and therefore they are not eye-witnesses. We are not convinced by the arguments advanced by learned Counsel for appellants.

17. DW-2 Bhura and DW-3 Hotam Singh have not stated that they have seen incidence. As per their statements, they have seen deceased in injured condition thereafter they intimated Raghuwar. DW-3 Hotam Singh has specifically admitted in paragraph 5 that he has not seen who has caused injury to Tejsingh. Therefore, testimony of Bhura and Hotam Singh is of no use. So far as DW-1 Raghuwar is concerned, he is not a witness of incidence. He has deposed that Gambhira and Sunharilal approached him and reported him that one dead body is lying near temple then he accompanied with Kachhu watchman reached on spot where he saw dead body of Tejsingh lying on the ground and then he went to Sukha and Lakharam and called them. So far as version of this witness is concerned, he is not a witness of incidence. His testimony that he called Sukha and Lakharam is not sufficient to discard the testimony of eyewitnesses Sukha and Lakharam when their testimony is found to be concise, precise and fully satisfactorily and reliable. Moreover statement of defence witnesses is not reliable as per postmortem report and statement of Dr. A.K. Saxena PW-9, deceased died after six hours of taking food and as per statement of these witnesses Tejsingh died at about 8 p.m.

18. So far as contention of the learned Counsel for appellants that Investigating Officer has not examined other independent eyewitnesses is concerned, even if it is presumed that alleged eyewitnesses have not been examined by I.O., it would not be a sole ground to discard the testimony of eye-witnesses PW-3 Sukha and PW-4 Lakharam specifically when there is no contradiction or inconsistency in their statements.

19. Next contention of learned Counsel for appellants is that statement of eye-witnesses is belied by medical evidence. As per statement of Sukha in paragraph 13 Gabbar Singh caught hold of deceased from front side and Balkishan and appellant Sultan Singh and Babulal inflicted injury on his head from back side. It is further contended by the learned Counsel for the appellants that in postmortem, no injury has been detected on back portion of head of deceased. Therefore, statement of this witness is not medically corroborated. It is further submitted that as per prosecution's own case appellants were three in number and they inflicted blow by means of their respective weapons and only two ante-mortem injuries were detected on the head of deceased and that too on the frontal side of the head. Therefore, it is not possible that three appellants are inflicting blows on the head and only two injuries are sustained by deceased. In support of the contention learned Counsel for the appellants has placed reliance in the case of State of U.P. v. Ram Bahadur Singh and Ors. 2004 SCC (Cri.) 1463 and on a citation Devatha Venkataswamy v. Public Prosecutor, High Court of A.P. 2004 SCC (Cri.) 963. In that case there was a conflict between medical and oral evidence and appellant stated to have pierced the forehead of the deceased with a spear (sharp-edged weapon) once and as per medical evidence the said injury was caused by the use of a blunt weapon and that too by repeated blows. Hence there was direct conflict between oral and medical evidence and it was held that High Court erred in concluding that the medical evidence supported the oral evidence. Further reliance has been placed on State of U.P. v. Mushtaz Alam (2008) 1 SCC (Cri.) 27. In that case presence of alleged eyewitnesses at the spot has also been found to be not established and the testimony of the witnesses were inconsistent with medical evidence. It was held that it apparently shows that they had not seen the actual occurrence. On these grounds, appeal was dismissed and judgment of acquittal of High Court was upheld. Another reliance has been placed on State of U.P. v. Shiv Kumar and Ors. (2006) 1 SCC 99. In this case presence of other alleged eyewitness at the scene of occurrence was doubtful, hence it has been held that High Court has rightly given the accused benefit of doubt.

So far as citation relied upon by learned Counsel for the appellants are concerned, on a meticulous reading it transpires that they are distinguishable on facts and circumstances and would not bolster or apply in the case at hand.

20. As far as the contention of learned Counsel for appellants that when three appellants are inflicting blows on the head of deceased and only two injuries have been detected in postmortem report and therefore prosecution story is

belied by medical evidence is concerned, we do not agree with the submission made by learned Counsel for appellants.

As per evidence of Dr. A.K. Saxena (PW-9) and postmortem report (Ex.P/14) following injuries were detected in the head of deceased;

(1) lacerated wound on frontal region of skull size 2"x1/4"

(2) Depressed fracture in pterion region involving frontal parietal, temporal and maxillary bone; and

(3) Lacerated wound size 1"x1/4" on fronto parietal region just above at end of right eye-brow

Dr. Saxena has stated in cross-examination in paragraph 8 that injuries No. 1 and 3 cannot be inflicted from the back side of deceased and injury No. 2 was impact of injury No. 3.

21. On going through the record it is crystal clear that the appellants have inflicted blows on the head of the deceased Tejsingh and PW-4 Lakharam has specifically stated that all the appellants inflicted blows on the head of deceased. Though PW-3 Sukha has not stated specifically about the position of victim and from which side assault was made but it does not make the testimony of PW-3 Sukha unreliable. It is alleged that three accused persons were inflicting blows on the head of deceased. In such an incidence it would naturally difficult for a witness to precision from where blows were given to deceased whether from his front side or back side. So if he has not noticed the details even then his testimony that one appellant caught hold deceased and other appellants caused injuries to him by their respective weapons is not liable to be rejected. In the case of Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat, it is held that by and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen. It has been further held that ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated lateron.

22. So far as only two injuries have been found on the dead body of the deceased is concerned, even if it is presumed that one blow of one of the accused was missed, even then liability of all is fastened u/s 34 IPC as act is done in furtherance of common intention of all accused. Therefore, everyone is equally responsible for committing the murder of the deceased.

Moreover, in the case of Thaman Kumar Vs. State of Union Territory of Chandigarh, the Hon''ble Apex Court has held that the conflict between oral testimony and medical evidence can be of varied dimensions and shapes. There may be a case where there is total absence of injuries which are normally caused by a particular weapon. There is another category where though the injuries found on the victim are of the type which are possible by the weapon of assault,

but the size and dimension of the injuries do not exactly tally with the size and dimension of the weapon. The third category can be where the injuries found on the victim are such which are normally caused by the weapon of assault but they are not found on that portion of the body where they deposed to have been caused by the eyewitnesses. The same kind of inference cannot be drawn in the three categories of apparent conflict in oral and medical evidence enumerated above. In the first category it may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful. However, in the second and third categories no such inference can straight away be drawn. The manner and method of assault, the position of victim, the resistance offered by him, the opportunity available to the witnesses to see the occurrence like their distance, presence of light and many other similar factors will have to be taken into consideration in judging the reliability of ocular testimony. Case in hands would fall under third category. So no such inference can be drawn that PW-3 Sukha and PW-4 Lakharam have not witnessed the incidence.

23. Last contention of learned Counsel for appellants is that provisions of Section 157 CrPC have not been followed as PW-8 T.I. Chhotelal has admitted in para 15 of his cross-examination that receiving information immediately he went on the place of occurrence and after directing Head Moharrir to send copy of FIR to concerned Magistrate and today he is unable to tell that when copy of FIR was sent to concerned Magistrate. In the case of Animireddy Venkata Ramana and Others Vs. Public Prosecutor, H.C. of A.P., it is held that FIR need not precede the information regarding commission of cognizable offence received by officer in charge of a police station and requiring him to reach the place of occurrence as early as possible. Moreover, in the case of Shiv Ram and Another v. State of U.P. 1998 SCC (Cri.) 278 it is held that mere delay in dispatching the copy of FIR to Magistrate is no ground to reject entire prosecution case.

24. Considering the above legal position if Investigating Officer is not able to tell that when the copy of FIR was sent to concerned Magistrate then no adverse inference can be drawn in present circumstances of the case.

25. In the light of the above discussions considering the evidence produced, there is sufficient reason to hold the testimony of eyewitnesses reliable and in consonance with version of FIR. There is no reason found that appellants have been falsely implicated by the eyewitnesses and the ocular version is corroborated by medical evidence also. It is proved that fatal injuries have been caused on the head of the deceased by appellants. Thus, it is proved that the appellants-accused have committed murder of deceased Tejsingh in furtherance of their common intention and the Trial Court did not commit any error in convicting the appellants for the offences as aforesaid. Appeal accordingly is dismissed. Findings of the learned trial court with respect to conviction and sentence of the appellants is confirmed.

26. Appellants are on bail. Their bail bonds shall stand cancelled after they

surrender before the learned Trial Court on or before 25th February, 2010 failing which the learned Trial Court shall issue perpetual warrant against them. The learned Trial Court shall, in that situation, also issue notices to the sureties of the appellants and may proceed against them in accordance with law. It is, however, made clear that in case, appellants surrender before the learned Trial Court on or before 25th February, 2010 their bail bonds shall stand cancelled and the learned Trial Court is directed to send them to jail to serve out the remaining part of jail sentence.

Registry is directed to send the record of the learned Trial Court posthaste so as to reach on or before 25th February, 2010. After appellants are arrested, the learned Trial Court shall also intimate the Registry of this Court.