
(2006) 12 MP CK 0019
In the Madhya Pradesh High Court

Dhanni @ Dhaniram and Others

APPELLANT

Vs

The State of Madhya Pradesh

RESPONDENT

Date of Decision : 14-12-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 174, 374
Penal Code, 1860 (IPC) — Section 147, 149, 302, 34

Citation : (2006) 12 MP CK 0019

Hon'ble Judges : R.S. Jha, J;A.K. Shrivastava, J

Bench : Division Bench

Final Decision : Allowed

Judgement

A.K. Shrivastava, J.—Feeling aggrieved by the judgment of conviction and order of sentence dated 13-11-1992 passed by learned Sessions Judge, Narsinghpur in Sessions Trial No. 7/92 convicting appellants u/s 302/34, IPC and sentencing them to suffer RI for life and fine Rs. 100/-, in default, RI for one month each, this appeal has been filed u/s 374 (2), Cr.PC.

2. During the pendency of this appeal, appellant Netram died and his name has been deleted from the array of the cause title.

3. In brief the case of prosecution is that in the month of Kuwar (September) some quarrel took place between Chhotelal (hereinafter referred to as "the deceased") and appellant Sukke. By making said quarrel as pivot, on 19-8-1991 when deceased was sitting along with his father Nihal Singh and Shiv Prasad in his house at that juncture appellant Sukke, Dhaniram, Netram and Munna arrived at the house of the deceased and invited him for a chicken party. Thereafter deceased along with these accused persons came to the house of Sukke, where it is said that all the accused persons caused injuries by lathis to the deceased and killed him. One Mohkam, on hearing the due and cry came and saw appellants causing injuries to the deceased by lathis in his Dalan (Verandah).

4. It is the further case of prosecution that the incident was witnessed by Ramlo

Bai who is the mother of Mohkam, however on account of fear they came back to their home and did not narrate this fact to anybody. It is said that in the mid-night, appellants came to the house of Ramlo Bai and gave threat that in case they would narrate the incident to anybody, they may face dire consequences and they will be killed.

5. It is the further case of prosecution that accused persons thereafter threw the dead body of the deceased underneath railway bridge in the stream of Sher river and came back to their home. On the next day, i.e., 20-8-1991 at 10.00 in the morning, Mohkam stated the incident to Nihal Singh that the appellants have killed the deceased, as a result of which he (Nihal Singh) went to the police station and lodged the First Information Report.

6. On lodging of the First Information Report, criminal law was triggered off and set in motion. The investigation agency arrived at the spot; prepared the spot map; recorded the statement of witnesses; arrested the accused persons and on the basis of their memorandum statement seized lathis from their possession which were used as weapon in the commission of offence; seized the dead body on 25-8-1991 from the field of Kandhai; prepared the Panchanama (Exh. P-7) on 21-8-1991 in regard to the seizure of blood from Sukhanala as well as prepared another Panchanama on 25-8-1991 when the dead body was recovered and completed the investigation.

7. After completion of the investigation a charge-sheet was submitted in the Competent Court which on its turn committed the case to the Court of Session where appellants were tried.

8. Learned Sessions Judge on the basis of the averments made in the charge-sheet against accused persons framed charge punishable under Sections 147, 302/149, IPC. Needless to emphasize all the accused persons abjured their guilt and pleaded complete innocence.

9. In order to bring home the charges the prosecution examined as many as 7 witnesses and placed Exhs. P-1 to P-35 the documents on record.

10. The defence of accused persons is of maladroitness implication and in support of their defence they examined one Gokal Singh as D.W. 1.

11. The learned Trial Judge on scrutiny of the evidence came to hold that except appellants other co-accused persons did not commit any offence and eventually acquitted them by the impugned judgment. However, according to learned Trial Judge, since there is positive evidence against the present appellants they have been convicted u/s 302/34, IPC and have been directed to suffer imprisonment which we have mentioned hereinabove.

12. In this manner the present appeal has been filed by appellants assailing their judgment of conviction and order of sentence.

13. It has been contended by Shri Anand Naik, learned Counsel for appellants

that if the entire case of prosecution is considered in proper perspective, it would reveal that P.W. 3, Mohkam appears to be a planted witness and his evidence is not at all reliable. It has been further contended that looking to the conduct of P.W. 3, Mohkam since he remained silent for one day and did not narrate the incident to anybody, his testimony is unreliable. The contention of learned Counsel is that as per prosecution's own case the incident had taken place in the Verandah of appellant Sukke but no blood stained earth was seized from the spot and if according to the prosecution the Dalan was painted by cow dung, it was the duty of prosecution agency to seize the scrap in order to show whether there was any blood stain in the said scrap of old cow dung. The contention of learned Counsel is that as per prosecution's own case the dead body was found in the field of Kandhai as it very much appears on bare perusal of Panchayatnama (Exh. P-6), dated 25-8-1991 and, therefore, it was incumbent upon the prosecution to explain and demonstrate that how the dead body reached in the field of Kandhai when according to the prosecution, the incident took place in the Verandah of accused Sukke.

14. Further it has been contended by Shri Anand Naik, learned Counsel for appellants that as per prosecution's own case, which could be revealed on bare perusal of Naksha Panchayatnama, dated 21-8-1991 (Exh. P-7), after committing the vile act of committing murder, the dead body was thrown from the railway bridge in Sher river from where it reached up to the field of Kandhai, and hence, there should be some connecting evidence in order to prove these facts. Since all these important facts which go to the root of the matter have not been proved, therefore, it raises a heavy doubt in regard to the implication of appellants in the offence. In support of his contention, learned Counsel has placed reliance on the decision of Supreme Court Ramsewak and Others Vs. State of M.P., and Kunju Muhammed @ Khumani and Another Vs. State of Kerala, .

15. By placing reliance on the decision of Supreme Court Ram Kishan and Ors. v. State of U.P. (2006) 1 SCC 603, it has been argued by Shri Anand Naik that since the witnesses of Exh. P-7 Naksha Panchayatnama, namely, Amar Singh, Ram Sevak, Babulal and Surendra, have not been examined, it cannot be said that the story mentioned in the Naksha Panchayatnama (Exh. P-7) that after committing murder the dead body was thrown in the stream of the Sher river, cannot be placed reliance. True Ganesh who is one of the witness of Exh. P-7 has been examined as P.W. 4 but he has not at all stated all these facts that the dead body of the deceased was thrown by accused persons in the river. By placing reliance on the decision of State of U.P. Vs. Bhagawan and others, , it has been argued by Shri Anand Naik that in the spot map the place where Mohkam was standing has not been shown, therefore, the case of prosecution becomes doubtful.

16. By further placing reliance on the decision of the Supreme Court State of Rajasthan v. Bhanwar Singh (2004) 13 SCC 147, it has been argued that the conduct of Mohkam is highly unnatural. Lastly, it has been submitted by Shri Anand Naik, learned Counsel that it has come in the evidence of P.W. 3, Mohkam

that in the light of Chimni he did see the incident and it was not possible for him to see the incident in such a dim light and for that purpose he has placed reliance on the decision of Supreme Court Joseph alias Jose v. State of Kerala 2004 SCC 93. By further placing reliance on this decision, it has also been contended by learned Counsel that since Mohkam narrated the incident to Nihal Singh, who is father of the deceased, next day and this fact did not find place in his case diary statement recorded u/s 161, Cr.PC, therefore in the Court, if he says that he had narrated the incident to Nihal Singh, amounts to material improvement and the evidence of Nihal Singh cannot be placed reliance. Thus, according to the learned Counsel there is serious doubt in regard to the implication of the accused persons in the said offence and indeed no one has seen the incident. The other eye witnesses have not been examined by the prosecution. The contention of learned Counsel is that the suspicion however grave it may be cannot take place of a strict proof.

17. On the other hand Shri S.K. Rai, learned Government Advocate argued in support of the impugned judgment and has submitted that Mohkam (P.W. 3) is a reliable witness, because after the incident took place on very next day, i.e., 20-8-1991 his case diary statement was recorded and it is for the prosecution see which witness is to be examined, if there are more than one eye witness. In support of his contention learned Government Advocate has placed reliance on the decision of Supreme Court Sarwan Singh and Others Vs. State of Punjab, . By placing reliance on another decision of Supreme Court Anil Phukan v. State of Assam 1993(1) Crimes 1180, it has been contended that single testimony of eye witness would be sufficient and there is no necessity to examine more eye witnesses.

18. By replying the argument of learned Counsel for the appellant, it has been contended by learned Government Advocate that if the statement of Mohkam was recorded after one day it will not dilute the entire case of prosecution and it will not be fatal to the prosecution. In support of his contention, the decision of Supreme Court State of U.P. Vs. Satish, , has been placed reliance by him.

19. It has also been argued by learned Government Advocate that the blood stained earth could not be recovered from the Verandah of appellant Sukke because it was painted afresh by cow dung as it appears from bare perusal of Exh. P-7 which is the Naksha Panchayatnama and this has also been so stated by Nihal Singh (P.W. 1) and Shiv Prasad (P.W. 2). By placing reliance on the decision of Supreme Court Tori Singh Vs. The State of Uttar Pradesh, , which was placed reliance in later decision Jagdish Narain and another Vs. State of U.P., , it has been argued that if the presence of the eye witness has not been mentioned in the spot map, it will not at all be fatal for the prosecution. According to the learned Government Advocate if there is faulty investigation, the real culprit should not be benefited and in that regard two decisions have been placed reliance they are State of U.P. Vs. Jagdeo and Others, , and Ashok Kumar and Others Vs. State of Tamil Nadu, .

20. By replying the argument of learned Counsel for the appellants that the dead body was found in the field of Kandhai, it has been argued that it would not wash out the entire case of prosecution and no benefit could be given to the appellants, reliance has been placed on Damodar Vs. State of Karnataka, .

21. By replying the argument of learned Counsel for the appellants that in a dim light of Chimni, P.W. 3, Mohkam was not in position to see the actual incident, it has been argued that village persons are habitual to see even in the dim light and they can identify the persons even in the light of earthen lamp. In support of his contention, reliance has been placed on Kalika Tiwari and others Vs. State of Bihar, . Thus, according to learned Govt. Advocate, the learned Trial Court did not err in convicting the appellants and this appeal be dismissed.

22. Having heard learned Counsel for the parties, we are of the considered view that this appeal deserves to be allowed.

23. In the present case, the sole eye witness who was examined by the prosecution is P.W. 3, Mohkam. Though it is borne out from the record that there are other eye witnesses also. Before we deal with the testimony of Mohkam, we would like to put our emphasis on certain documents placed on record. Exh. P-1 is the FIR lodged by P.W. 1, Nihal Singh who is the father of deceased. The FIR was lodged on 20-8-1991 at 16.30 hours. In the FIR it has been specifically stated by the author that Mohkam and one more person and along with the of the village came to his house and informed him that the deceased has been killed by Sukke, Dhaniram, Netram an Munna Gond and where the dead body has been thrown is a mystery. Thereafter, Nihal Singh along with his another son Shiv Prasad and other persons Jagat Singh, Dabbu along with near about 15 persons went to the place of occurrence, i.e., Verandah of Sukke and found that it was freshly painted fyik iqrk fn[kkbZ fn;k. Nobody was found in the house except one old aged woman who also told that his son has been killed by the boys of Bahori Par. The same facts also find place in the merg report (Exh. P-3) recorded u/s 174, Cr.PC.

24. In the spot map (Exh. P-4), place of occurrence has been shown and marked at No. 1, and after crossing the entire field of Meera Bai, a place Sukhanala has been shown at point No. 2, where it is said that blood stains were found and after travelling a long distance from point No. 2 nearby the bank of Sher river, where the field of Kandhai has been shown the dead body of the deceased was found. The Naksha Panchayatnama (Exh. P-7) was prepared in the presence of Amar Singh, Ram Sevak, Babulal, Surendra and Ganesh and these persons opined that appellants have hidden the dead body of the deceased or have thrown it in the river. This has also been so mentioned by Nihal Singh, Ramlo Bai and Janak Gond in document (Exh. P-7). These three persons further stated in Exh. P-7 that appellants caused lathi injuries to the deceased in Verandah of Sukke. In Exh. P-7, it has been further mentioned that thereafter, deceased was running in injured condition from the house of Sukke and appellants were chasing him and ultimately they reached upto Sukhanala and at that place also

accused persons caused injuries by lathi and killed him at Sukhanala. Further some more facts are stated in Exh. P-7 that Nihal Singh, Ramlo Bai and Janak further told that one Janak has seen the entire incident and these appellants scrapped the door of Dalan and re-painted it by fresh cow dung as fresh paint of cow dung is apparent. At Sukhanala blood stained earth and hair of the deceased were seized but the dead body was not found. After narrating all these facts in Exh. P-7, thereafter, the Investigating Officer gave his opinion in the document of Exh. P-7 that after causing injuries to the deceased in the Verandah when deceased was running away, he was chased by the appellants and at the place of Sukhanala he was further beaten by lathis and was killed at that place.

25. The dead body of the deceased was found on 25-8-1991 two kilometers towards north from the Railway over bridge in the field of Kandhai Patel and the dead body was found to be eaten by the animals. This Naksha Panchayatnama was prepared in the presence of Babulal, Ramdeen, Dorilal, Lal Singh and Gendalal.

26. On going through the FIR (Exh. P-1) and merger intimation report (Exh. P-3), it is revealed that the deceased was beaten by lathis by the appellants and use of any sharp edged weapon has not been so mentioned in these two documents, but, in the post-mortem report the doctor found incised wounds on the abdomen, chest wall region and according to the autopsy surgeon the injuries were caused by hard and sharp edged weapon as well as hard and blunt object. On going through the post-mortem report (Exh. P-9), we find that the deceased sustained following injuries:

(i) Linear fracture line 7 cm long transverse, present on left temporal region starting from the coronal suture and going horizontally & posteriorly bone ecchymosed.

(ii) An other radiating fracture "X" shaped present on left mastoid & occipital region starting from anterior part of mastoid 7 cm long going posteriorly and bifurcated in post 2 cm lengths one going upwards and other going downwards. Ant part of bifurcated in upward direction for 2 x 5 cm length, bone contused and ecchymosed.

(iii) Sharp cut 2.5 x 1 oblique situated on back of left side abdomen at the level of L3 vertebra directed downwards & lateral margins clean cut and wound lating with the abdominal cavity. Maggots ecchymosis evident the margin.

(iv) Sharp cut 7x3 cms on left chest wall on lateral part.

(v) Upper medial angle of Rt. Scapula is fractured & contused. Fracture line extended up to lower 1/3 and measured 10 cm in length.

(vi) Left 9, 10 and 11th ribs fractured on lateral part with chipping effect on posterior surface.

(vii) Left scapula fractured linearly in 11.5 cm and 8 cm length vertically 2 cm

apart from each other and contused.

27. Thus, the picture which is depicted up to this stage, as per the case of prosecution is that appellants caused injuries to the deceased in the Verandah of the house of Sukke; deceased was running away from Verandah of the house of appellant Sukke; he was chased by all the appellants and ultimately after crossing a long distance at Sukhanala he was further beaten and, in fact, he was killed there, as blood stains were found at Sukhanala, thereafter as per the case of prosecution the dead body of the deceased was carried away by appellants and was thrown in the Sher river which is 2 kms north and ultimately the same was found in the field of Kandhai which is adjacent to the bank of Sher river. According to FIR, the blows were given by lathis and there is no whisper in regard to use of any sharp edged weapon in the FIR. However, in the postmortem report (Exh. P-9) as well as according to the Autopsy Surgeon Dr. D.S. Thakur (P.W. 7), which we have noted hereinabove, incise wounds were also found on the vital organ of the deceased.

28. In order to meet out the post-mortem report, it appears that the theory of causing of injuries by axe which has been assigned to appellant Sukke has been planted and thrust since it has been so stated by Mohkam the sole eye witness who has been examined as P.W. 3 that Sukke caused injuries by axe to the deceased and other accused persons caused injuries by lathis. At this juncture, it would be germane to peruse the case diary statement (Exh. D-2) of Mohkam and on going through the case diary statement, it is revealed that it has been specifically stated by this witness that all the accused persons were causing injuries by latins. Nowhere in his case diary statement it has been so stated that axe was used by any of the accused. Thus, according to us in order to meet out the opinion of Autopsy Surgeon in the post-mortem report, theory of causing injuries by axe has been later on planted in the testimony of Mohkam (P.W. 3). According to us this amounts to material improvement.

29. If we further scan the evidence of Mohkam, we would find that he has seen the incident upto the extent of causing injuries to the deceased in the Verandah of appellant Sukke and later on this witness came back to his home and did not see the incident further. According to him, on account of receiving lathi injuries by the deceased, he fell down. But, thereafter, there is no further evidence of any of the prosecution witness in order to prove the factum of causing injury at Sukhanala and killing ultimately the deceased at Sukhanala. Since it is the prosecution's own case, which we have discussed hereinabove in the document of Exh. P-7 that the deceased ran away from the Verandah to Sukhanala and travelled a long distance and was being chased by all the appellants and ultimately at Sukhanala further blows of lathi were dealt and ultimately he died at Sukhanala, according to us, this poses a big question mark on the story of the prosecution and the genesis of the occurrence. In absence of connecting evidence in this regard, it is difficult to hold that the deceased was running away from Sukhanala and ultimately he was killed at Sukhanala and thereafter his

dead body was uplifted or dragged and thrown from railway bridge in the stream of Sher river and ultimately which was found in the field of Kandhai located nearby the bank of Sher river.

30. At this juncture, we would also like to mention that the prosecution has not examined the material witnesses. On going through the Naksha Panchayatnama (Exh. P-7), it is gathered that Nihal Singh, Ramlo Bai and Janak Gond told the witnesses of Exh. P-7 that appellants caused injuries by lathi to the deceased in the Verandah and witness Janak has seen the entire episode as he also saw that the deceased was running away and was being chased by the appellants. But, why Janak and Ramlo Bai have not been examined by the prosecution, there is no satisfactory explanation. True Nihal Singh has been examined, but he himself stated that he has not seen the incident though on going through Exh. P-7, it is revealed that he has seen the incident. That apart there is no whisper in Exh. P-7 that Mohkam has also seen the incident. The case diary statement (Exh. D-2) of Mohkam was recorded on 20-8-1991 and Exh. P-7 was prepared on next day, i.e., 21-8-1991. According to us, this amounts to suppression of material evidence. If Janak and Ramlo Bai have seen the entire incident including that part of the incident that deceased was running away and was chased up to a long distance of Sukhanala where he was ultimately killed, according to us, sufficient light would have been thrown by these two persons if they would have been examined in the case in order to clear the clouds. However, we cannot read in between the two lines in absence of cogent evidence that deceased was chased as he was running away from the Verandah to that of Sukhanala and after travelling a long distance in injured condition ultimately he was killed at Sukhanala. Hence under these circumstances, the decisions placed reliance by learned Government Advocate Sarwan Singh and Anil Phukan (supra) are not applicable.

31. Apart from this, there is further material omission in the statement of sole eye witness Mohkam (P.W. 3) as he narrated the incident on the next day to the father of the deceased, namely, Nihal Singh but on bare perusal of case diary statement (Exh. D-2), nowhere it is gathered that he ever told the incident on the next day to Nihal Singh.

32. We are not deciding the contention of learned Counsel for the parties as to whether in the dim light Mohkam was able to see the incident and whether non mentioning of presence of eye witness in the spot map is fatal or not since we have disbelieved and we are not placing reliance on the evidence of sole eye witness Mohkam on the basis of the reasonings we have assigned hereinabove.

33. True, the Investigating Officer (P.W. 6), Shambhu Dayal Tiwari has stated that after killing the deceased, appellants have thrown the dead body of the deceased from railway bridge and ultimately it was found in the field of Kandhai which is adjacent to the bank of the river but his evidence is not at all admissible, as he has not seen the incident. The decision of Ram Kishan (supra), placed reliance by learned Counsel for the appellants is worth reliable. In Para 8

of this decision it has been held by the Supreme Court that witnesses who have given statement to the Investigating Officer, if they have not been examined, their statements cannot be proved by the Investigating Officer. In the case at hand also the witnesses of Exh. P-7 have not been examined and therefore even if the Investigating Officer's evidence is that those witnesses have stated the facts to him, cannot be placed reliance as it would amount to hearsay evidence. True, one of the witnesses Ganesh has been examined as P.W. 4 but he has not at all stated the facts narrated in Exh. P-7. His only evidence is that much that on the date of incident at 4-5 p.m. he found appellants and deceased together and appellant Sukke was saying that a chicken party has been arranged in his house in which deceased is invited.

34. We do agree with the contention of learned Government Advocate that on account of faulty investigation accused persons should not be benefitted, but in the present case there appears to be no faulty investigation, however, the prosecution has not examined the material witnesses of Exh. P-7 as well as Janak and Ramlo Bai who according to the prosecution have seen the entire incident. Thus, two decisions Jagdeo (supra) and Ashok Kumar (supra), are not applicable in the present case.

35. The decision of Damodar (supra), is tangentially off the point of several reasons. The first reason is that it is a case of circumstantial evidence however, the present case is of direct evidence; secondly in that case the dead body was found in the house of the accused and the same was exhumed from his house, and therefore, it was held by the Supreme Court that it was for the accused to give explanation that how the dead body has been recovered from his house but the facts of present case are entirely different. In the present case, the dead body has been found nearby the bank of river, in the field of Kandhai.

36. For the reasons stated hereinabove, according to us, the prosecution has not been able to prove its case and by extending the benefit of doubt to the appellants, the judgment of conviction is hereby set aside and they are acquitted from all the charges.

37. Resultantly, this appeal succeeds and is hereby allowed. The conviction of appellants u/s 302/34, IPC is hereby set aside. Appellant No. 1 Netram had already died during the pendency of this appeal. The other appellants are on bail, their bail bonds are discharged.