
(2005) 04 SHI CK 0005
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 346 of 2004

Ghanshyam Dass

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 20-04-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 313
Evidence Act, 1872 — Section 27, 9
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2005) 2 ShimLC 210

Hon'ble Judges : Lokeshwar Singh Pant, J; K.C. Sood, J

Bench : Division Bench

Advocate : M.S. Guleria, for the Appellant; Som Dutt Vasudeva, A.A.G. and D.S. Nainta, D.A.G., for the Respondent

Final Decision : Allowed

Judgement

Lokeshwar Singh Pant, J.—Appellant Ghanshyam Dass (hereinafter referred to as "the accused") along with four other persons faced trial in Sessions Trial Nos. 5/1999, 28/2004 for the alleged commission of offence punishable u/s 302 read with Section 34 of the Indian Penal Code, 1860 (for short TP Code"). The learned Presiding Officer, Fast Track Court, Mandi found the accused Ghanshyam Dass to be guilty of offence u/s 302 IP Code and sentenced him to undergo imprisonment for life and to pay a fine of Rs. 5,000/- and in default of payment of fine to undergo further simple imprisonment for a period of two years. While four co-accused, namely, Tara Chand alias Taro, Smt. Kaura Devi alias Vidya Devi, Rattan Chand alias Rato and Kishori Lal were acquitted. The prosecution version may briefly be stated thus:

2. On 6.12.1997 Kirpa Ram resident of village Dharbahar husband of PW-3 Smt. Nirmla Devi was bed ridden due to illness. PW-3, her son and PW-4 Vijay Kumar son of Sh. Janki Dass after taking their meal at about 7 or 8 p.m. were sitting in second storey of the house of Kirpa Ram. PW-3 is the sister of Janki Dass. She

heard the voice of the accused from a place known as Ropari saying "Pakro-Pakro Behan Chod Sale Ko Pakro main Bhi Aa Gaya". On hearing this voice, PW-3 and PW-4 heard some noise as if some body was giving beating to some person belonging to the village of PW-3. PW-3 also heard the voice of her brother Janki Dass. She along with PW-4 rushed to the place from where the voice was coming. When they reached at Ropari, they found Janki Dass below the house of the accused lying in injured condition who was bleeding profusely and was unconscious. PWs 3 and 4 tried to lift Janki Dass from the place of occurrence when they again heard the accused making "khangara" (voice of caution). Janki Dass was brought to the house of PW-3 where he regained consciousness after about half an hour. On enquiry being made by PW- 3 and PW-4, Janki Dass told them that Ghasitu alias Ghanshyam (accused) inflicted "Danda" blows on him whereas his wife Kaura Devi, Ratto and Tara Chand assaulted him with a stone and Kishori Lal accused standing nearby was instigating the other accused persons. Janki Dass lost his consciousness and after about two and half hours he regained his conscious and called his wife PW-8 Ambo Devi twice. Janki Dass then succumbed to his injuries.

3. On the following day at about 7.30 a.m. PW-4 accompanied by one more boy namely Finu went to the house of PW-1 Sant Ram, brother-in-law of the deceased (sister's husband) resident of village Guiana and informed him that Janki Dass had died due to injuries inflicted by "Sunaras". The accused persons are known as "Sunyaras" in the vicinity. PW-1 is a retired Sub-Inspector of Police of H.P. He passed on the said information to the police telephonically which came to be recorded in daily diary Ext.PX by PW-13 Head Constable Ravinder Kumar at 8.15 a.m. in Police Station, Jogindernagar. Thereafter PW-17 Sub-Inspector Parkash Chand alongwith PW-15 Assistant Sub-Inspector Balbir Singh, PW-11 Sukh Ram and Head Constable Paras Ram rushed to the scene of occurrence. On reaching at the house of PW-3, they found the dead-body of the deceased lying on a floor of the room in a pool of blood. PW-17 recorded the statement of PW-3 u/s 154 of the Code of Criminal Procedure (for short Cr.P.C.) Ext. PN which was sent to the Police Station through PW-11 for registration of the case. ASI Jaishi Ram recorded formal First Information Report Ext.PY in the Police Station, Jogindernagar at 8.30 p.m. Photographs Ext.PM-1 to Ext.PM-13 of the dead-body of the deceased were taken by PW-2 Bhagi Rath inside the house of PW-3. PW-17 prepared inquest papers Ext.PZ. H.C. inspected the spot where the incident had taken place and prepared spot map Ext. PZ/A. Blood stained stone Ext.P-2 containing heirs of the leg of the deceased were removed from the stone and taken into possession vide seizure memo Ext. PA and packed in a parcel by affixing seal impression "B". The blood stained stone Ext.P-2 was also taken into possession vide seizure memo Ext.PB which was sealed in a parcel with seal impression "B". Blood soil earth was taken into possession vide recovery memo Ext.PC. A pair of blood stained shoes was also found at the spot and the same was also taken into possession vide seizure memo Ext.PD. The specimen of seals impression Ext.PZ/2 was separately taken at the spot. The Investigating Officer

recorded the statements of the witnesses PW-15 ASI Balbir Singh arrested the accused on the same day. The accused and his co-accused Tara Chand produced their blood stained clothes to him which were taken into possession vide recovery memo Ext. PE and Ext. PF respectively. The clothes were packed and sealed in a separate parcel.

4. On 11.12.1997 PW-17 interrogated the accused. All the accused made joint disclosure statement Ext. PG u/s 27 of the Evidence Act in the presence of PW-1 and one Raj Singh (not examined) pointing out the place of occurrence where the deceased had quarreled with them. Accused Ghanshyam made a disclosure statement Ext. PH u/s 27 of the Evidence Act that he had kept concealed "Danda" with which he had given blow on the legs of Janki Dass and he could get the same recovered. The accused got "Danda" Ext. P-10 recovered from the bushes near his house. Seizure memo Ext. PL was prepared and the spot map Ext. PZ/D of recovery of "Danda" was also prepared. On 8.12.1997 PW-17 had deposited four sealed packets and two sealed parcels which were deposited by PW-15 on the same day with PW-12 ASI Ramesh Chand in the Malkhana. PW-17 deposited three more sealed parcels on 9.12.1997 and one more sealed parcel on 11.12.1997 in the Malkhana. During investigation, the spot was also got demarcated from PW-7 Mahender Kumar who at the relevant time was posted as Patwari in the office of A.C.O. Lad-Bharol. After completion of the investigation and on receipt of the report Ext. PW from Forensic Science Laboratory, Junga PW-17 handed over the case file to PW-14 Inspector Sanjhi Ram who submitted charge sheet against the accused persons before the learned Additional Chief Judicial Magistrate, Jogindernagar.

5. The trial of the case was committed to the learned Sessions Judge, Mandi by the learned Additional Chief Judicial Magistrate. The learned Sessions Judge assigned the trial of the case to the learned Additional Sessions Judge, Mandi for disposal, but later on case was transferred to the Presiding Officer, Fast Track Court, Mandi.

6. In order to bring home the conclusion, the prosecution has examined 17 witnesses in all.

7. All the accused persons in their statements u/s 313 Code of Criminal Procedure pleaded false implication and claimed to be innocent. In defence DW-1 Brahmchari Ram Kumar Dass, DW-2 Ravinder Kumar and DW-3 Inder Raj were examined.

8. There is no direct evidence connecting the accused persons with the offence charged. The prosecution case depends upon circumstantial evidence. The pieces of circumstantial evidence which have been relied upon are as under:

1. That the deceased had made dying declaration in the presence of PW-3 and PW-4 implicating all. The accused persons in giving beating to him.
2. That the accused persons while in police custody, gave disclosure statement u/

s 27 of the Evidence Act and in pursuance of the said disclosure statement, they identified the place of occurrence.

3. That the accused persons were seen scuffling with the deceased at the material time by PW-16 Om Prakash.

4. That the accused Tara Chand also presented, his clothes during investigation which on Chemical Examination were found to be stained with blood.

5. That the voice of accused Ghanshyam Dass was recognized by PW-3 and PW-4 when they heard the noise of the beating of the deceased.

6. That the accused Ghanshyam Dass while in police custody also gave disclosure statement u/s 27 of the Evidence Act and in pursuance of the said disclosure. Statement he got recovered the weapon of offence i.e. danda and as per medical evidence on record the injuries sustained by the deceased which resulted in his death are possible with danda Ext.P-10.

7. That the accused Ghanshyam Dass has also presented his clothes during investigation which on Chemical Analysis were found to be stained with blood and the blood on the said clothes was of Group-A and the blood sample of the deceased was also of Group-A.

9. Placing reliance on the evidence of the relevant witnesses, the trial Court has found that the prosecution has failed to establish circumstances Nos. 1 to 4 against accused Ghanshyam Dass, but convicted and sentenced him holding that Circumstances Nos. 5, 6 and 7 have been proved against him, but found that the prosecution has not proved the above said circumstances so far as co-accused Tara Chand, Smt. Kaura Devi, Rattan Chand and Kishori Lal are concerned and accordingly directed their acquittal.

Feeling aggrieved by the conviction and sentence imposed upon him, the accused Ghanshyam Dass has preferred this appeal.

10. In support of the appeal, the learned Counsel for the accused submitted that learned trial Court has passed the order of conviction on surmises and conjecture. The prosecution has not fully established the Circumstances relied upon by the learned trial Court holding the accused to be guilty of the offence.

11. In response, the learned Additional Advocate General for the State supported the judgment of the learned trial Court and further submitted that in view of the analysis of the evidence made by the learned trial Court and the nature of the injuries proved to have been inflicted on the person of the deceased, no interference is called for by this Court in the judgment of the learned trial Court.

12. We would proceed to examine each of the pieces of incriminating circumstantial evidence so as to find out if each one of the circumstantial evidence is proved individually and whether collectively it forges such a chain of incriminating circumstances as would fasten the guilt on the accused beyond any shadow of reasonable doubt.

13. In Sharad Birdhichand Sarda Vs. State of Maharashtra, the Supreme Court held as under: [(SCC p.185, para 153)]

The following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) The circumstances should be of a conclusive nature and tendency.

(4) They should exclude every possible hypothesis except the one to be proved, and

(5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

14. In Dhananjay Chatterjee alias Dhana Vs. State of W.B., their Lordships held as under: (SCC p. 229, para 7)

In a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis except the guilt of the accused and the chain of the evidence must be so complete as not to leave any reasonable ground for the belief consistent with the innocence of the accused. It needs no reminder that legally established circumstances and not merely indignation of the Court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof.

15. The decision of Sharad Birdhichand Sarda and Dhananjoy Chatterjee cases (supra) were relied upon by their Lordships of the Supreme Court in Subhash Chand Vs. State of Rajasthan,

16. In order to appreciate the rival contentions of learned Counsel for the parties and in the light of the settled proposition of law laid down in the aforesaid judgments, we have reappraised and scrutinized the evidence appearing on the record.

Circumstance No. 5

17. The voice of accused Ghanshyam Dass was recognized by PWs 3 and 4 when they heard noise of giving beating to the deceased.

18. On the point of this circumstance held against the accused Ghanshyam Dass, the learned trial Court has relied upon the evidence of PW-3 Smt. Nirmala Devi sister of the deceased and PW-4 son of the deceased. She deposed that on 6.12.1997 at about 7-8 p.m. after taking meals she along with her son and PW-4 were sitting in the room of her house where her husband Kirpa Ram was bed ridden. She heard accused Ghanshyam Dass alias Ghasitu raising voice "Pakro-Pakro Behan Chod Sale Ko Pakro, Main Bhi Aya". The voice was coming from the place known as "Ropari". After some time she heard voice of her brother Janki Dass who was crying "Hey Mere Bhai". She along with PW-4 rushed to the place from where she heard the voice of her brother and on reaching there they found Janki Dass lying on the ground in unconscious condition below the house of the accused with injuries. When she along with PW-4 tried to carry her brother from the place of occurrence, they heard the accused raising "Khangara" (giving voice of caution). She picked up her brother on her back and he was made to lie on the ground of the room of her house on a bedding. In cross-examination she stated that she heard two voices of her brother Janki Dass at about 7 or 7.30 p.m. It has come in her cross-examination that on one side of her house there is Nallah and in front of the Nallah there is one temple and beyond the temple "Ropari" place is located.

19. PW-4 has corroborated the testimony of PW-3 to the extent that on 6.12.1997 he was sitting in the room of PW-3. His father had gone to village Chullah on that day. He heard the voice of the accused saying "Pakro, Pakro Sale Ko Main Bhi Aya" coming from the place known as "Ropari". He heard the voice of his father twice saying "Bhai ji, Bhai ji". He along with PW-3 went to the spot where his father was found lying in injured condition on the ground in unconscious condition. His legs were bleeding profusely. The accused raised "Khangara" (voice of caution). This witness on the following day had gone to the house of PW- 1 Sant Ram, the husband of the sister of the deceased and informed him that his father Janki Dass was given beating by "Sunaras" who had succumbed to his injuries in the house of PW-3. PW-1 is a retired Sub-Inspector of Police. He telephonically informed the police about the incident. We have very carefully examined the statement of PW-1. PWs 3 and 4 have not disclosed to PW-1 their near relative that they had recognized the accused by his voice saying "Pakro-Pakro Behan Chod Sale Ko Pakro, Main Bhi Aya". Had PWs 3 and 4 recognized the accused Ghanshyam Dass by his voice as they wanted the Court to believe, it was but natural for them to have disclosed this fact to PW-1 to prove the involvement of the accused in the crime. PW-3 is the resident of Dharbahar whereas the accused Ghanshyam Dass is the resident of village Chullah. It is not in dispute that identification of the accused u/s 9 of Evidence Act can be established by shape of body, gait, manner of walking or even by voice. It is equally true that the evidence about identification of a person by the timbre of his voice depending upon-subtle variations in the over tones when the person recognizing is not familiar with the person recognized may be some what risky in a criminal trial. PWs 3 and 4 have not deposed that the accused

Ghanshyam Dass is intimately known to them, it cannot be said that both these witnesses have clearly and positively recognized the identity of the accused by his voice as they have not stated that they were familiar with his voice prior to the incident. DW-1 Brahmchari Ram Kumar Dass stated that he is residing in temple situated about 150 yards from the place where the dead-body of Janki Dass was found. He did not hear any cry nor any voice of the accused. The temple where DW-1 was residing is situated between a place known as "Ropari" and the house of PW-3 as admitted by her in her deposition. On one side of her house there is Nallah and the temple is situated in front of the said Nallah. If the accused had raised any voice as alleged by PWs 3 and 4, in all probability DW-1 would have heard the same whereas it was not possible for PWs 3 and 4 to have heard "Khangara" of the accused in their room from a far off place of occurrence. Their evidence is shaky and unbelievable to hold that they have recognized the accused by his voice. Therefore, this circumstance has not been conclusively established by the prosecution against the accused Ghanshyam Dass. Ext.P-2 and "Danda" Ext.P-10 shown to him in the Court. In the cross-examination Doctor has stated that the edge of the stone had hit the leg of the deceased. The evidence coming on the record is not cogent and sufficient to prove that "Danda" Ext.P-10 was being used by the accused for inflicting injuries on the legs of the deceased. This circumstance, therefore, has not been conclusively proved by the prosecution against the accused.

Circumstance No. 7

20. The clothes of the accused were blood stained matching with the blood group-A of the deceased.

21. The Investigating Officer took into possession blood stained clothes of the accused Ghanshyam Dass and acquitted accused Tara Chand in the presence of PW-1 and one Ram Singh (not examined) vide recovery memos Exts.PE and PF respectively. In memo Ext.PE a pair of dark brown coloured shirt and trousers with green and white coloured floral cloth string bearing some blood stains near knee portion of right leg as well as on the bottom portion of both legs of the trousers were taken into possession from the accused Ghanshyam Dass. On 16.12.1997 MHC Ramesh Chand of Police Station Jogindernagar handed over 9 sealed parcels of the case property to PW-10 LHC Balak Ram for chemical analysis. PW-10 deposited the sealed parcels in F.S.L. Junga on 17.12.1997. PW-11 LHC Sukh Ram brought those parcels and report of the Chemical Examiner from F.S.L. Junga on 6.5.1998 and handed over the same to MHC Police Station Jogindernagar. PW-1 and the Investigating Officer identified Kurta Ext. P-5 and Pajama Ext.P-6 belonging to the accused Ghanshyam Dass. The learned Additional Advocate General contended that Ext.P4/A one black colour trouser and Ext. P-4/B one black shirt taken from parcel No. 4 by the Chemical Examiners were the clothes of the accused Ghanshyam Dass which were taken into possession by the Investigating Officer.

22. We have perused the report of Chemical Examiner's Ext.PW. Parcel No. 4

was sealed with five seals bearing seal impression "B" out of which Ext.4-Ka and 4-Kha were taken out. Ext.4-Ka was black coloured Pajama containing some brown colour stains of soil. Ext.4-Kha was containing black coloured shirt. As per the report of the Chemical Examiner blood group-A was found on Ext.4-Ka whereas particulars of blood on Ext. 4- Kha were not sufficient for further examination. The clothes Ext. 4 Ka and Ext. 4 Kha in report Ext.PW were different than the colour of the clothes mentioned in seizure memo Ext.PE allegedly recovered from the accused Ghanshyam Dass. The colour of the clothes stated in Ext.PE was pair of dark brown coloured shirt and trousers with green and white coloured floral cloth string and bearing some blood stains near knee portion of right leg as well as on the bottom portion of both legs of the trousers. The clothes which were allegedly recovered from the accused vide seizure memo Ext.PE did not tally with the clothes packed in parcel No. 4 Ext. 4-Ka and Ext. 4-Kha of the Chemical Examiner's report. The learned trial Judge has gravely erred in holding that shirt Ext. P-5 and Pajama Ext.P- 6 were the clothes of the accused Ghanshyam Dass containing blood stains of group-A. The prosecution has not conclusively proved that the clothes which were taken into possession from the accused Ghanshyam Dass were the same clothes which were sent to the Chemical Examiner for analysis having blood stained of group-A of the deceased. This circumstance is not proved against the accused by the prosecution by leading cogent, reliable and convincing evidence.

23. Thus, none of the circumstance relied upon as incriminating, by the learned trial Court is proved. It is settled law that between may be true and must be true there is a long distance to travel which must be covered by clear, cogent and unimpeachable evidence by the prosecution before an accused is condemned as convict. The accused can be convicted only on legal evidence and if chain of circumstantial evidence is so complete so as to rule out the possibility of any other reasonable hypothesis except the guilt of the accused.

24. The trial Court has proceeded on an assumption of availability of the above said three pieces of the circumstances in the chain of circumstantial evidence as stated hereinabove cannot form on the basis of the conviction of the accused/Appellant for the offence charged. The above stated three circumstances on which the conviction of the accused has been recorded by the trial Court are not of a conclusive nature and consistent to hold the accused guilty of the offence.

25. No other point was urged by the learned Counsel for the parties.

26. For the reasons given above, we hold that the prosecution has failed to prove its case against the accused beyond reasonable doubt. We, therefore, allow the appeal. Conviction of the accused Ghanshyam Dass u/s 302 of the IP Code is set aside. He is acquitted of the charge framed against him. He shall be set at liberty forthwith if not required to be detained in connection with any other offence.