
(2005) 04 SHI CK 0002

In the High Court Of Himachal Pradesh

Case No : Criminal Appeal No. 478 of 2004

Kishan Chand and Another

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 13-04-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 304, 325, 34

Citation : (2005) 2 ShimLC 218

Hon'ble Judges : M.R. Verma, J

Bench : Single Bench

Advocate : Sandeep Kaushik, for the Appellant; H.K.S. Thakur, D.A.G., for the Respondent

Final Decision : Allowed

Judgement

M.R. Verma, J.—This appeal is directed against the judgment dated 5.10.2004 passed by the learned Sessions Judge, Hamirpur whereby the Appellants-accused (hereafter referred to as "A-1 and A-2" in the order as mentioned in the Cause Title) have been convicted and sentenced as follows:

Accused Section under which convicted Sentenced imposed

Krishan Kumar(A-1) 304 Part II, IPC Rigorous imprisonment for 7 years and fine Rs. 5,000/- and in default of payment of fine further imprisonment of six months.

Sanjay Kumar (A-2) 325, IPC Rigorous imprisonment for 2 years and fine Rs. 1,000/- and in default of payment of fine further imprisonment of one month.

2. Case of the prosecution in brief is that Giffo Devi (since deceased), mother of Man Chand (PW-1) used to reside in village Balu alongwith her widowed daughter-in-law Praveen Kumari (PW-4) and children of PW-4. Other sons of Giffo Devi, namely Man Chand (PW-1), Dharam Paul (PW-2), Braham Dass (PW-11), are residing in separate houses located at some distance from the house of the deceased. Adjacent to her house is her Courtyard whereon there is

a cowshed and the other part of the Courtyard is used for tethering the cattle. Opposite to the house of the deceased is the house of the accused persons. On the morning of 24.2.2004 at about 9.30 a.m., the accused persons with the help of two labourers, namely Govind Ram and Govind Bahadur started digging land of the Courtyard of the deceased with Gainti, iron rod and Jhamb. The deceased objected to the digging of the land and asked the accused persons not to dig the same till it was demarcated. She further told the accused persons that she would leave the land in case found belonging to the accused persons. The accused persons, however, paid no heed. On the contrary A-2 gave a fist blow to the deceased on her face thereby knocking out her two teeth and A-1 gave a Gainti blow on the head of the deceased who fell down and both the accused went to their house. At the time of the occurrence, PW-1, PW-2, Nirmala Devi (PW-3) and PW-4 were on the spot. They lifted the deceased who was unconscious to the Varandah of their house where she was made to lie on a cot. On hearing of the incident PW-11 and Giano Devi (PW-5) came to the house of the deceased. A taxi driven by Raj Kumar (PW-8) was arranged by PW-11 and the deceased was removed to Zonal Hospital, Hamirpur. PW-1 reported the occurrence at Police Station, Hamirpur and as a consequence FIR Ext.PA came into being. The deceased succumbed to the injury and the concerned Medical Officer conveyed her death to MHC Sudesh Kumar (PW-13). As a result, report Ext.PW-13/A was recorded at the Police Station. However, before her death the deceased had been medically examined by Dr. D.R. Sharma (PW-9) who issued MLC Ext.PW-9/A about such examination. Photographs of the dead-body were taken and inquest reports Exts.PW-10/B and PW-10/C were prepared. Post-mortem on the dead-body was conducted by Dr. Dinesh Thakur (PW-10) and his post-mortem report is Ext.PW-10/D. The spot was photographed. The blood stained soil and stones, earth sample, a shawl and blood found in the Varandah were taken in possession vide memo Ext.PW-2/A by the Investigating Officer (PW-15). A pair of Chappals Ext.P-8 left on the spot by the accused persons and shoes of the deceased Ext.P-7 were also taken in possession from the spot vide memo Ext.PW-2/B. The pillow Ext.P-12 which had got blood stained when the deceased was laid on the cot in the Varandah of her house was also taken in possession vide memo Ext.PW-2/B. One of the knocked out tooth Ext.P-10 of the deceased was produced to the PW-15 by PW-4 and was taken in possession vide Ext.PW-2/C. After arrest, A-1 made a disclosure statement Ext.PW-4/A on interrogation by PW-15 in the presence of Giano Devi (PW-5) and Tej Singh, as a consequence whereof Gainti Ext.P-2, sketch whereof is Ext.PW-2/F, was recovered from the residential house of the accused vide memo Ext.PW-2/J. The clay attached to the Gainti was separated and seized vide memo Ext.PW-2/G. On production by A-1, Pyajama Ext.P-19 and T-Shirt Ext.P-20 were taken in possession vide memo Ext.PW-2/J. On production by A-2 his Pant Ext.P-16, T-Shirt Ext.P-17 were also taken in possession vide memo Ext.PW-2/H. The place of incident was got demarcated through Patioari Manjit Singh (PW-6) and site plan was prepared by Manish Kumar JE (PW-7). The incriminating articles taken in possession were got analyzed vide report of the Chemical Examiner, Ext.PW-15/F. On completion of

the investigation, charge-sheet was submitted against the accused persons, who came to be tried by the trial Court on a charge u/s 302 read with Section 34, IPC.

3. To prove the charge against the accused persons, prosecution examined as many as 15 witnesses. Statements of the accused persons were recorded u/s 313 Code of Criminal Procedure wherein they denied the prosecution case and claimed that the witnesses belong to the same family and wanted to involve them in the case. Accused Sanjay Kumar has further claimed that he was not present on the spot. The accused persons, however, did not lead any defence evidence.

4. On consideration of the material on record, the learned trial Court convicted and sentenced the accused persons as aforesaid. Hence, this appeal by the accused persons.

5. I have heard the learned Counsel for the accused persons and the learned Deputy Advocate General for the Respondent-State and have also gone through the records.

6. It was contended by the learned Counsel for the accused persons that the prosecution has led the evidence of related witnesses only whose evidence is contradictory of each other and despite admitted availability of independent witnesses no such witness has been examined, therefore, in view of the permissible inference from withholding the independent witnesses, the contradictory statements of related witnesses produced by the prosecution could not have been relied upon. It was also contended that the evidence of the related witnesses even otherwise is not corroborated by any independent evidence including medical evidence, therefore, conviction cannot be based on such contradictory and uncorroborated statements. To substantiate his contention, the learned Counsel for the accused persons has relied on *Malhu Yadav and Others Vs. State of Bihar*, *Nallabothu Venkaiah Vs. State of Andhra Pradesh*, and *Deepak Kumar Vs. Ravi Virmani and Another*,

7. On the other hand, the learned Deputy Advocate General while supporting the judgment of the trial Court and the conclusions therein contended that the evidence of related witnesses cannot be disbelieved simply because they are related to the victim but if inspire confidence can be acted upon. There is no conflict in the eye account given by the eye witnesses and the medical evidence and the injuries sustained by the deceased were found capable of being caused in the circumstances as is the case of the prosecution. It was further contended that the prosecution is not expected to examine as many eye witnesses of an occurrence as may be present on the spot and in case the prosecution believes that the so called independent witnesses are going to resile at the trial it can give them up as has happened in this case and the prosecution cannot be said to have committed the lapse of non-production of material witnesses. It was, therefore, urged that the ratio in the different cases relied upon by the accused persons does not help the accused persons in the facts and circumstances of the

case in hand and the impugned conviction and sentence, therefore, does not call for any interference.

8. The prosecution in support of its case has examined four eye-witnesses out of whom Man Chand (PW-1) and Dharam Pal (PW-2) are the sons and Nirmala Devi (PW-3) and Praveen Kumari (PW-4) are the daughters-in-law of the deceased. Thus, the eye witnesses are the members of the same family and closely related to each other and the deceased, hence, they are related witnesses. However, there is no law that evidence of a related witness in no case can be accepted and has to be rejected. It is, however, a rule of caution that while appreciating the evidence of the related witnesses the Court must do so with due care and caution. In case their evidence is found natural, consistent and confidence inspiring a conviction can be based on such evidence. However, if there is any suspicion about the trustworthiness of the witnesses for any reason the Court may act on such evidence if duly corroborated by some independent evidence. If there is no independent corroborative evidence and the suspicion about the truthfulness of the related witnesses is well founded their evidence cannot be acted upon and the benefit must go to the accused.

9. In Mallu Yadav's case (supra), the Apex Court while dealing with the value of the evidence of the related witnesses, held that the fact that some of the witnesses were related to the victim's family is no ground to reject their evidence as untrustworthy. In law what is expected is to analyze and scrutinize the same with due care and caution before accepting or acting upon the same.

10. In Nallabothu Venkaiah's case (supra), while dealing with appreciation and value of the statements of inimical witnesses, the Apex Court held that the witnesses are inimically disposed to the accused alone would be no ground to throw away their otherwise natural, reliable and creditworthy statements. The test, in such circumstances, is that if the witnesses are interested, the same must be scrutinized with due care and caution in the light of the medical evidence and other surrounding circumstances. Animosity is a double edged-sword and it can cut both sides. It can be a ground for false implication and can also be a ground for assault.

11. In Deepak Kumar's case (supra), the Apex Court held that the witnesses though be interested can be relied upon provided, however, the evidence available on record is trustworthy and creates a confidence in the mind of the Court and points out only a commission of an offence by the accused persons and the scrutiny in totality leads to an inevitable conclusion of the guilt of the accused.

12. Since there is no dispute about the legal position as referred to herein above, therefore, the respective submissions regarding value of the statements of PW-1 to PW-4 have to be examined in view of the aforesaid legal position.

13. It may be pointed out at this stage that as per the contents of FIR Ext.PA, lodged by PW-1, at the time of the occurrence PW-1, PW-2 and one Kaushalya

Devi wife of Sarvan were present on the spot. There is no reference in the FIR that PW-3 and PW-4 were also present on the spot whereas in the ordinary course, being closely related to the informant, in the event of their being present, they could not have been ignored from being mentioned in the FIR as the eye-witnesses of the occurrence. Thus, the version as in the FIR raises some suspicion as to the presence of PW-3 and PW-4 on the spot at the time of the occurrence. Therefore, the statements of the related eye-witnesses call for strict scrutiny with due care and caution. It is more so in view of the admitted position as in the statement of PW-4 that the complainant party has a land dispute with Munshi Ram, father of the accused persons, and at the relevant time the accused persons were digging the land about which the dispute exists and such a dispute as per the admission of PW-4 exists since long. It simply means that there were no cordial relations between the complainant party on the one hand and the family of the accused persons on the other.

14. Insofar as A-2 is concerned, the allegations against him are that he gave a fist blow on the face of the deceased whereby two teeth of the deceased were broken (perhaps the expressions "broken" has been used in the evidence for knocking out). It is so stated by PW-1 and PW-2 and it is further their evidence that at the relevant time PW-3 and PW-4 were also present on the spot. However, PW-3 has nowhere stated that two teeth or any number of teeth of the deceased was knocked out by the blow given to her by A-2. She has not stated at all about the knocking out of the teeth of her mother-in-law because of the assault by either of the accused persons. PW-4 has stated that A-2 slapped the deceased but she has not attributed the knocking of the teeth to the alleged fist blow given to the deceased by A-2. On the contrary, her version is that her teeth were knocked out due to the Gainti blow which was given by A-1. In view of these contradictory statements on material particulars, it is unbelievable and unreliable that the teeth of the deceased were knocked out by the blow given to her by A-2. It is more so when there is no other independent evidence to attribute the knocking out of the teeth of the deceased by A-2 and thereby his committing an offence punishable u/s 325, IPC cannot be held to have been proved beyond reasonable doubts.

15. It may be pointed out that it has been the constant defence of the accused persons in the form of suggestions given to the material witnesses that the complainant party picked up the quarrel and assaulted the accused persons and the deceased fell down from the retaining wall and thereby sustained the injuries without any act of omission or commission on the part of the accused persons. The existence of a wall at the place where the occurrence is stated to have taken place is though denied by PW-15 to whom it was suggested that he had intentionally omitted to mention such a retaining wall in the site plan prepared by him. However, existence of such a wall on the spot is admitted by PW-3 and PW-4. Therefore, denial of existence of the retaining wall and not showing the same in the site plan by the Investigating Officer is indicative of the fact that during investigation the true facts had been twisted and concealed which creates

further doubts about the truthfulness of the version of the prosecution.

16. It is case of the prosecution itself that the occurrence took place on land Khasra No. 368 which is entered in the possession of Munshi Ram, father of the accused persons, as is clearly and unambiguously admitted by the Investigating Officer (PW-15) and it is also specifically admitted by Braham Dass (PW-11), son of the deceased, who has stated that the place where the accused persons were digging was got demarcated by the police and on such demarcation the Patwari had told that the occurrence had taken place on Khasra No. 368. This land is entered in the possession of Munshi Ram, father of the accused persons as is the sum and substance of the statement of Manjit Singh (PW-6), a Patwari, read with copy of Aks Shajra Ext. PW-6/B and copy of Jamabandi Ext. PW-6/D which shows the land where the occurrence took place in the possession of Munshi Ram and other co-sharers other than the complainant party. PW-4 has also specifically and unambiguously stated that the fields where the accused persons did the digging were made by Munshi Ram. If so, evidently it is Munshi Ram, father of the accused persons, who prepared the fields in which the accused persons were digging and, thus, it was in possession of Munshi Ram, father of the accused persons. The discrepant and uncorroborated version of PW-1 and PW-2 that the land where the accused persons had started digging had been in their possession, therefore, is not true and reliable. Thus, there is evidence on record that digging operations were carried out by the accused persons in the land converted into the fields and possessed by their father. If so, the deceased and other family members had no legal right to enter upon the said land with a view to prevent the digging operations more so when none of the PWs have claimed that it was owned by them. Thus, it is clear that if the aggression was made it was made by the complainant party and not by the accused persons. This conclusion is further strengthened by the unambiguous admission of PW-4 that had they (complainant party) not stopped the digging by the accused persons incident would not have occurred. Thus, the very genesis of the occurrence is the aggression by the complainant party. Keeping in view these facts and the long standing dispute between the parties it is not possible to lay implicit reliance on the evidence of PW-1 to PW-4 regarding the manner of occurrence resulting in sustaining of the injuries by the deceased unless their statements are corroborated by any other independent evidence more so in view of the constant defence of the accused persons that the injuries were sustained by the deceased because of a fall from the wall.

17. As per the FIR, one of the persons who witnessed the occurrence was Kaushalya Devi, however, she has not been produced by the prosecution. It is admitted case of the prosecution that the accused persons had engaged two labourers, namely Govind Ram and Govind Bahadur and they were also present on the spot. None of these two persons has been examined by the prosecution. All these three witnesses who, according to the prosecution, had witnessed the occurrence had not been examined on the plea that they had been won over by the accused persons. Such a reason for non-production is the conception of the

prosecution. The prosecution ought to have examined them and in the event of their turning hostile, it should have cross-examined them with the leave of the Court and it was for the Court to evaluate their testimony and Prosecutor's opinion in this regard is immaterial. Therefore, by not producing these witnesses the prosecution had withheld the most material evidence from which an inference adverse to the prosecution has to be drawn.

18. It is version of PW-1, PW-2 and PW-4 that the injury on the head of the deceased was caused by A-1 by giving a blow with the pointed edge of the Gainti. It is the head injury sustained by the deceased which according to the medical opinion proved fatal as opined by Dr. Dinesh Kumar (PW-10). Dr. D.R. Sharma (PW-9) who medically examined the deceased before her death has opined that injury No. 1 i.e. knocking out of the teeth could be possible by giving fist blow on the face whereas injury No. 2 could be possible by giving a blow of spade Ext.P-2. However, he has admitted that such injury could be possible by a fall if the head is struck, against a pebble or stone. Almost similar is the opinion of PW-10. However, there is some marked difference in the evidence of the eye-witnesses and the medical opinion. It is a matter of common knowledge that a Gainti, an instrument meant for digging, has two edges, one of which is a pointed edge whereas the other edge is flat. When it was specifically put to PW-10 as to which edge of the Gainti Ext.P-2 would have caused injury sustained by the deceased, he has specifically stated that the injury in question could be possible with the second part of Ext.P-2 to which part he has referred to as "Chapta Hissa" i.e. the flat edge of the Gainti. According to the eye-witnesses the injury was caused by A-1 to the deceased with the pointed edge of the Gainti Ext.P-2.

19. It cannot be disputed that value of medical evidence is only corroborative and it can be taken into account to come to a conclusion whether the injuries could have been caused in the manner as alleged. The defence can use the medical evidence to show that the injuries could not have been caused in the alleged manner and thereby discredit the eye-witnesses. Therefore, in case of conflict between the medical evidence and oral testimony of the witnesses, the Court can either believe the prosecution witnesses unreservedly or may rely upon the medical evidence and appreciate the oral testimony with caution in the light of the medical evidence. The Court can adopt the former course only in those cases where the oral evidence is above reproach and confidence inspiring and there is no appreciable reason for false implication of the accused. However, where the evidence is not of that character and the medical evidence is not open to any doubt or suspicion the only safe and judicial method of assessing the evidence is the latter course.

20. In the case in hand, as already stated herein above, according to the eye-witnesses, the injury was caused by A-1 to the deceased with the pointed edge of the Gainti Ext.P-2 whereas according to the specific medical opinion vide Ext.PW-10/F the injury in question could be possible with the flat edge of the

Gainti meaning thereby that the injury as noticed by PW-10 on the body of the deceased could not have been caused with the pointed edge of the Gainti. There is no reason nor has been pointed out any to suspect the medical opinion on this score whereas the eye-witnesses are not only related witnesses but are admittedly having long standing land dispute with the family of the accused persons, therefore, their statements cannot be believed and relied upon even in view of the medical evidence. On the contrary, the defence version that the injuries were sustained by the deceased because of fall from the retaining wall seems probable.

21. The only other piece of evidence relied upon by the prosecution is that Gainti Ext.P-2, i.e. the alleged weapon of offence, was recovered pursuant to the disclosure statement Ext.PW-5/A of A-1 vide memo Ext.PW-2/G. The said disclosure statement, according to the prosecution, was made by A-1 in the presence of Tej Singh and Giano Devi (PW-5). Said Tej Singh has not been examined by the prosecution and PW-5 who is a ward member of the concerned Panchayat has not supported the prosecution version regarding making of the disclosure statement Ext.PW-5/A and the recovery of the weapon at the instance of A-1. Thus, it is also not proved beyond reasonable doubts that A-1 made the disclosure statement and got Ext.P-2 recovered as alleged by the prosecution.

22. In view of the above discussion, it can be safely concluded that the evidence led by the prosecution is not cogent, consistent, trustworthy and confidence inspiring and the prosecution had failed to prove the charges against the accused persons. Therefore, the impugned conviction and sentence cannot be sustained.

23. As a result, this appeal is allowed and the impugned conviction of and sentence awarded to each of the accused persons are set aside and they are acquitted of the respective charges against them. The accused persons, who are presently in jail undergoing the sentence of imprisonment awarded to each of them, be set at liberty forthwith unless required to be detained in custody under any other process of law. Fine, if recovered, be refunded to them.